No. 06-1666
Title: Mohammad Munaf, et al., Petitioners
v.
Pete Geren, Secretary of the Army, et al.
Docketed: June 15, 2007
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (06-5324)
Decision Date: April 6, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Jun 13 2007	Petition for a writ of certiorari filed. (Response due July 16, 2007)
Jul 11 2007	Order extending time to file response to petition to and including August 15, 2007.
Aug 8 2007	Order further extending time to file response to petition to and including September 14, 2007.
Sep 7 2007	Order further extending time to file response to petition to and including September 21, 2007.
Sep 21 2007	Brief of respondents Pete Geren, Acting Secretary of the Army, et al. in opposition filed.
Oct 3 2007	DISTRIBUTED for Conference of October 26, 2007.
Nov 5 2007	Reply of petitioners Mohammad Munaf, et al. filed.
Nov 20 2007	DISTRIBUTED for Conference of December 7, 2007.
Dec 7 2007	Petition GRANTED The case is consolidated with No. 07-394 and a total of one hour is allotted for oral argument.
Dec 20 2007	The joint appendix and the consolidated brief on the merits of Geren, Sec. of Army, et al., is to be filed on or before January 22, 2008, and the briefs of amici curiae in support or in support of neither party are to be filed within 7 days after the consolidated brief of Geren, Sec. of Army, et al., is filed. The consolidated brief on the merits of Munaf, et al., and Omar, et al., is to be filed on or before February 21, 2008, and any amici curiae briefs in support are to be filed within 7 days after the brief on the merits of Munaf, et al., and Omar, et al., is filed. VIDED.
Jan 22 2008	SET FOR ARGUMENT ON Tuesdy, March 25, 2008.
Jan 22 2008	Joint appendix filed. VIDED.
Jan 22 2008	Brief of the Federal Parties, Pete Geren, Secretary of the Army, et al., filed. VIDED.
Jan 25 2008	Record received from the U.S.C.A. for the Federal Circuit. (1 box)
Jan 28 2008	CIRCULATED.
Jan 28 2008	Record from the U.S.D.C. for the District of Columbia Circuit is electronically filed.
Feb 21 2008	Brief of Habeas Petitioners filed. VIDED. (Distributed)
Feb 28 2008	Brief amici curiae of M. Cherif Bassiouni and Other International Law Professors filed. VIDED. (Distributed)
Feb 28 2008	Brief amici curiae of The Associated Press, et al. filed. VIDED. (Distributed)
Feb 28 2008	Brief amici curiae of Non-Governmental Organizations filed. VIDED. (Distributed)
Feb 28 2008	Brief amicus curiae of National Institute of Military Justice filed. VIDED. (Distributed)
Feb 28 2008	Brief amici curiae of Constitution Project and Rutherford Institute filed. VIDED. (Distributed)
Feb 28 2008	Brief amici curiae of Professors of Constitutional Law, and the Federal Courts filed.

	VIDED. (Distributed)
Feb 28 2008	Brief amicus curiae of American Bar Association filed. VIDED. (Distributed)
Feb 28 2008	Brief amici curiae of Former U.S. Diplomats and Security Specialists filed. VIDED. (Distributed)
Feb 29 2008	Letter from counsel for Munaf, et al., and Omar, et al., with copy of a recent decision of the Public Commission of the Iraqi Court of Cassation vacating Mohammad Munaf's conviction and sentence. VIDED. (Distributed)
Mar 17 2008	Reply of Federal Parties, Pete Geren, Secretary of the Army, et al. filed. VIDED. (Distributed)
Mar 25 2008	Argued. For Pete Geren, Secretary of the Army, et al.: Gregory G. Garre, Deputy Solicitor General, Department of Justice, Washington, D.C. For Munaf, et al. and Omar, et al.: Joseph Margulies, Chicago, Ill.

59

Supreme Court, U.S.
FILED

No. 06-1666 JUN 13 2007

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In The
Supreme Court of the United States

MOHAMMAD MUNAF, ET AL.,

Petitioners,

v.

PETE GEREN, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

JONATHAN HAFETZ
AZIZ Z. HUQ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
Telephone: (212) 998-6730

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL, LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

JOSEPH MARGULIES
Counsel of Record
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713

VINCENT MOCCIO
AMY MAGID
ROBINS, KAPLAN, MILLER & CIRESI
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. When an American citizen is detained under the exclusive control of American military authorities abroad, is the jurisdiction of a federal court to entertain his petition for a writ of habeas corpus defeated by the fact that those American military authorities purport to act as a part of a multi-national force and that they propose – with no valid legal authority – to deliver the citizen to a foreign nation for execution of a death sentence imposed by a court of that nation?

2. Does the decision of the Court of Appeals, holding that *Hirota v. MacArthur* deprives the federal courts of jurisdiction under these circumstances, extend the 1948 *per curiam* opinion in *Hirota* into conflict with this Court's post-1948 jurisprudence culminating in *Rasul v. Bush* and *Hamdi v. Rumsfeld*, and should that conflict be resolved either by restricting *Hirota* to its proper sphere or by overruling it?

3. Did the Court of Appeals err in holding that the jurisdiction of the federal courts over a habeas corpus petition filed by an American citizen detained under the exclusive control of American military authorities abroad turns on whether those authorities propose to deliver him to a foreign nation for prosecution in its courts (in which case the Court of Appeals has held that habeas jurisdiction exists) or for execution of sentence after conviction by the foreign court (in which case the Court of Appeals here holds that jurisdiction ceases to exist)? If this distinction is valid, can the military authorities defeat federal habeas corpus jurisdiction *ex post* by doing what they did in this case – arranging the conviction and sentencing of their detainee by a foreign court *after* his habeas petition has been filed?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

Mohammad Munaf, who is imprisoned at Camp Cropper, in Iraq, appeared below as the petitioner, with his sister, Maisoon Mohammed, acting as his next friend. The following people appeared below as respondents: Pete Geren, the Secretary of the Army; Major General John D. Gardner, Deputy Commanding General of Detainee Operations; and Lieutenant Colonel Quentin K. Crank, petitioner's immediate custodian.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR A WRIT OF CERTIORARI	1
CITATION TO OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT	2
A. Statement of Facts	3
B. Proceedings Below	4
REASON FOR GRANTING THE WRIT	9
THE COURT SHOULD GRANT THE WRIT BECAUSE THE LOWER COURT IMPROPERLY EXTENDED *HIROTA v. MACARTHUR* TO A U.S. CITIZEN IMPRISONED BY U.S. SOLDIERS AT A U.S. MILITARY PRISON	9
A. Introduction	9
B. Citizenship Has Been "A Head Of Jurisdiction" For Nearly Sixty Years	12
C. Treating Mr. Munaf's Case As An Exception To The Rule Of Habeas Jurisdiction For Citizens Has Created Dangerous Uncertainty In The Law	16

TABLE OF CONTENTS – Continued

Page

a. By Making Habeas Jurisdiction Hinge On The Fact Of A Foreign Conviction, The Lower Court Ignored Settled Constitutional Principles And Introduced Needless Ambiguity Into The Law Of Prisoner Transfers 17

b. Neither An Executive Agreement Nor A U.N. Resolution Can Suspend The Great Writ 24

CONCLUSION 27

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004) 22

Barr v. United States Department of Justice, 819 F.2d 25 (2d Cir. 1987) 22

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973) 13, 15

Burns v. Wilson, 346 U.S. 137 (1953) 13

Ex parte Bollman, 8 U.S. 75 (1807) 25

Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) 26

Factor v. Laubenheimer, 290 U.S. 276 (1933) 17, 23

Geofroy v. Riggs, 133 U.S. 258 (1890) 25

Grupo Dataflux v. Atlas Global Group, 541 U.S. 567 (2004) 19

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) ..... *passim*

Hirota v. MacArthur, 338 U.S. 197 (1948) (per curiam) ..... *passim*

Holmes v. Jennison, 39 U.S. 540 (1840) 18

Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), *cert. denied*, 409 U.S. 869 (1972) 18

Johnson v. Eisentrager, 339 U.S. 763 (1950) 12, 14, 15, 16, 20

Madsen v. Kinsella, 343 U.S. 341 (1952) 13

McElroy v. Guagliardo, 361 U.S. 281 (1960) 13

TABLE OF AUTHORITIES – Continued

Page

Missouri v. Holland, 252 U.S. 416 (1929) 25

Munaf v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006) 1, 7

Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007) .....*passim*

Omar v. Harvey, No. 06-5126, Slip Op. (D.C. Cir. Feb. 9, 2007) 19, 20, 22

Quinn v. Robinson, 783 F.2d 776 (9th Cir.) *cert. denied*, 479 U.S. 882 (1986) 17

Rasul v. Bush, 542 U.S. 466 (2004) .....*passim*

Reid v. Covert, 354 U.S. 1 (1957) 25

Republic of Austria v. Altmann, 541 U.S. 677 (2004) 21

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989) 8

Terlinden v. Ames, 184 U.S. 270 (1902) 18

Underhill v. Hernandez, 168 U.S. 250 (1897) 22

United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) 13

Valentine v. United States, 297 U.S. 5 (1936) 17, 18, 23

CONSTITUTIONAL PROVISIONS

U.S. Const. Art. I, § 9, cl. 2 ..... 2, 5

U.S. Const. Art. III, § 2, cl. 2 22

U.S. Const. amend. V 1, 4, 5

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2241 .....2, 5, 17

TABLE OF AUTHORITIES – Continued

Page

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82 17

Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (Oct. 17, 2006)..... 26

LEGISLATIVE MATERIALS

152 Cong. Rec. H7925-02, H7946, 2006 WL 2796911 (daily ed. Sept. 29, 2006) 26

152 Cong. Rec. S10243-01, S10267, 2006 WL 2771411 (Sept. 27, 2006) 26

Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq, 108th Cong. 3 (2004)..... 4

Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs., 108th Cong. (June 24, 2004) 4

ADMINISTRATIVE AND EXECUTIVE MATERIALS

Executive Agreement of July 27, 1942, 57 Stat. 1193 25

INTERNATIONAL MATERIALS

U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility (Mar. 5, 2007), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf..... 6, 23

TABLE OF AUTHORITIES – Continued

Page

U.N. Resolution 1386 (Dec. 20, 2001) 14

U.N. Resolution 1511 (Oct. 16, 2003) 14

U.N. Resolution 1546 (June 8, 2004) 14

TREATISES

M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (4th ed. 2002) 18

R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* (8th ed. 2002) 20

MISCELLANEOUS

Appellant's Pet. for Reh'g and Reh'g En Banc, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Mar. 26, 2007) 19

Arg. Tr., *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455) 23

Arg. Tr., *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sep. 11, 2006) 4

Brief of Petitioner, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306) 12

Brief of Petitioner-Appellant, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) 21

Brief for the Appellees, *Munaf v. Harvey*, 482 F.3d 582 (D.C. Cir. 2006) (No. 06-5324) 4

Munaf v. Harvey, No. 06-A471, Order, 2006 WL 3262398 (U.S. Nov. 13, 2006) 8

Munaf v. Geren, No. 06-5324, Order (D.C. Cir. May 9, 2007) 9

TABLE OF AUTHORITIES – Continued

Page

Munaf v. Harvey, No. 06-5324, Order (D.C. Cir. Nov. 10, 2006) 8

Munaf v. Harvey, No. 06-5324, Order (D.C. Cir. Oct. 27, 2006) 7

Pet'n for Writ of Habeas Corpus, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) 21

Pet'rs' Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455) 5

Pet'rs' Supp. Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455) 7

Resp. Pet'rs' Supp. Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455) 6

Resp'ts' Mem. in Opp. to Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455) 5

PETITION FOR A WRIT OF CERTIORARI

Mohammad Munaf, with his sister Maisoon Mohammed as next friend, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007), and is reprinted at Appendix A to this petition. The opinion of the United States District Court for the District of Columbia is reported as *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006), and is reprinted as Appendix B.

JURISDICTION

The Court of Appeals entered its judgment April 6, 2007, and, on May 9, granted Mr. Munaf's motion to stay the mandate pending the disposition of this petition. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law. . . .

This case also involves the Suspension Clause to the Constitution, which provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

This case also involves 28 U.S.C. § 2241, which provides in relevant part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.
>
> * * *
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless –
>
> 1. He is in custody under or by color of the authority of the United States . . . ; or
>
> * * *
>
> 3. He is in custody in violation of the Constitution or laws or treaties of the United States. . . .

STATEMENT

This petition arises from a divided decision of the Court of Appeals for the District of Columbia Circuit dismissing the habeas corpus petition of a U.S. citizen in U.S. military custody overseas. The lower court relied on a 59-year-old *per curiam* opinion from this Court that it described as not "especially clear or compelling, particularly as applied to American citizens," a decision whose

continuing vitality has been called into question by more recent rulings here. But the Court of Appeals expressly concluded it would leave to this Court "the prerogative of overruling its own decisions." *Munaf v. Geren*, 482 F.3d 582, 585 (D.C. Cir. 2007) (App. A at 6).

A. Statement of Facts

Mohammad Munaf was born in Baghdad, Iraq, and emigrated to the United States in 1990 with his wife. J.A. 7.[1] In 2000, after ten years in the United States, Mr. Munaf naturalized to become an American citizen. *Id.* at 11. Mr. Munaf and his wife have three young children, all U.S. citizens. *Id.* at 12.

Mr. Munaf's wife is Romanian, and in 2001 he and his family moved to Bucharest. *Id.* In March 2005, three Romanian journalists invited Mr. Munaf to travel with them to Iraq as their paid translator and guide. *Id.* The four arrived in Iraq in mid-March 2005. In late March, they were kidnapped by an Iraqi group identifying itself as the "Muadh Ibn Jabal Brigade." On May 22, 2005, after nearly two months in captivity, Mr. Munaf and the three journalists were released. *Id.* Upon release, they were taken to the Romanian Embassy in Baghdad.

Immediately thereafter, U.S. military officers arrested Mr. Munaf. *Id.* They moved him to Camp Cropper, a U.S. prison near Baghdad International Airport, where he remains in the custody of U.S. personnel. *Id.* at 8; *Munaf*,

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[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals.

App. A. at 7 (Randolph, J., concurring in the judgment) ("[Munaf] is held by American forces overseas.").[2]

Mr. Munaf's custodians, like all U.S. soldiers in Iraq, answer *only* to a U.S. chain of command and are solely "subject to the authority, direction and control of the Commander, U.S. Central Command[.]" *Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108th Cong. 3 (2004).[3] As the government has properly conceded, U.S. citizens imprisoned in Iraq are entirely "in the authority and control of the United States." Arg. Tr., *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sep. 11, 2006).

B. Proceedings Below

On August 18, 2006 – after almost fifteen months in U.S. custody – Mr. Munaf petitioned for a writ of habeas

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[2] In the lower courts, the government described a non-judicial proceeding that it claims took place at Camp Cropper, and that supposedly led to Mr. Munaf's classification as a "security internee." Brief for the Appellees at 5-6, *Munaf v. Harvey*, 482 F.3d 582 (D.C. Cir. 2006) (No. 06-5324). It is undisputed that Mr. Munaf did not have the benefit of counsel at this proceeding, and the government pointedly does not suggest it satisfied the requirements of the Due Process Clause. When the litigation in this case moves to the merits, the district court may take the measure of this proceeding against the requirements imposed by the Court in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion) (military must demonstrate lawfulness of citizen's detention by judicial proceeding that satisfies Due Process Clause).

[3] General Casey's Senate testimony was to the same effect. *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multi-National Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (June 24, 2004) (U.S. soldiers in MNF-I do not answer to any component of the United Nations or to any entity other than the United States).

corpus in the United States District Court for the District of Columbia. Through his sister as next friend, he alleged that he had committed no crime or violent act against the U.S. or its allies; that he had not supported forces hostile to American interests; that he had not been a member of or associated with al-Qaeda or any insurgent or militia group; and that his detention by the Executive without lawful process violated, *inter alia*, the Suspension Clause and the Due Process Clause of the Fifth Amendment to the U.S. Constitution. J.A. 7, 13, 85-86. Mr. Munaf invoked the court's jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1), and (c)(3), as well as the Suspension and Due Process Clauses. *Id.* at 9.

Three weeks after Mr. Munaf began this litigation, counsel for the government advised Mr. Munaf's counsel that Mr. Munaf would be tried for an unspecified civilian crime by an Iraqi court and would be transferred to Iraqi custody if convicted. Because Mr. Munaf, a Sunni Muslim, faces a real and substantial risk of torture if he were delivered to the Iraqi Government, his counsel moved for a temporary restraining order ("TRO") to freeze the *status quo* and prevent any transfer pending the adjudication of his habeas petition. Pet'rs' Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). The government opposed the motion, contending the District Court lacked jurisdiction over Mr. Munaf's habeas petition. *Id.*, Resp'ts' Mem. in Opp. to Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455).

On October 12, 2006, despite the application for a TRO pending in the District Court, U.S. military officers presented Mr. Munaf before the Central Criminal Court of Iraq ("CCCI") to face criminal charges related to his alleged role in the kidnapping of his three Romanian

companions. *Id.*, Resp. to Pet'rs' Supp. Mot. for TRO at 1, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455).

Iraqi law requires that an aggrieved party issue a formal complaint against the accused before a prosecution can go forward. J.A. 53. Because Mr. Munaf was charged with kidnapping Romanian citizens, the CCCI could not begin a prosecution without a formal complaint from the Romanian government. *Id.* At the October 12 proceeding, Lieutenant Robert M. Pirone of the U.S. Coast Guard appeared in the CCCI, purportedly on behalf of the Romanian Government, to make a formal complaint against Mr. Munaf. Lieutenant Pirone stated that the Romanian Embassy had authorized him to appear on its behalf. *Id.* at 52. He claimed this authorization was documented in a letter submitted in advance to the Iraqi court. *Id.* No such letter was produced, however. Nor is it part of the public record in either the U.S. or Iraqi courts. *Id.* at 48. Neither Mr. Munaf nor his counsel has seen it. The Government of Romania, meanwhile, has officially and emphatically denied that it authorized Lt. Pirone to speak on its behalf. *Id.* at 85; *see also* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶21 (Mar. 5, 2007) ("Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to U.S. officer Robert Pirone.").[4]

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[4] Mr. Munaf has filed a complaint against the Government of Romania in the Inter-American Commission on Human Rights, alleging, *inter alia*, that Romania did not take actions within its power to protect Mr. Munaf from a death sentence. In its response, Romania has insisted Lt. Pirone had no authority to act for the Romanian

(Continued on following page)

After Lt. Pirone set forth what he claimed was Romania's position, he met *ex parte* with the presiding Iraqi judge for approximately fifteen minutes. Immediately thereafter, that judge convicted and sentenced Mr. Munaf to die. J.A. at 49. Mr. Munaf's appeal of his criminal conviction to the Iraqi Court of Cassation is still pending.

Mr. Munaf promptly notified the District Court that he had been convicted and sentenced to death. Pet'rs' Supp. Mot. for TRO, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). Nonetheless, on October 19, 2006, the District Court dismissed the case for want of subject matter jurisdiction and denied the TRO application as moot. *Munaf v. Harvey,* 456 F. Supp. 2d 115 (D.D.C. 2006) (App. B).

Mr. Munaf filed an immediate notice of appeal to the D.C. Circuit and asked the Court of Appeals to enjoin the government from transferring him to Iraqi custody pending the outcome of this litigation. On October 27, 2006, a divided motions panel denied the request over a written dissent, but granted an administrative injunction until November 6, conditioned upon Mr. Munaf seeking emergency relief in this Court by that date. *See Munaf v. Harvey,* No. 06-5324, Order (D.C. Cir. Oct. 27, 2006); *id.* (Tatel, J., dissenting). On November 6, petitioner filed simultaneous applications for injunctive relief here and with the *en banc* court of appeals.

Government in the Iraqi proceedings. The documents are available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf.

On November 10, 2006, the motions panel issued a *sua sponte* order extending its administrative injunction pending action by the *en banc* court. This removed any imminent risk to Mr. Munaf. Having been so informed, this Court on the next business day denied the motion which was still pending before it. *See Munaf v. Harvey*, No. 06-5324, Order (D.C. Cir. Nov. 10, 2006); *Munaf v. Harvey*, No. 06-A471, Order, 2006 WL 3262398 (U.S. Nov. 13, 2006). On December 15, the *en banc* court granted an injunction barring Mr. Munaf's transfer to Iraqi custody pending resolution of his appeal.

On April 6, 2007, a divided panel affirmed the dismissal of Mr. Munaf's habeas petition, concluding, reluctantly, that its hands were tied by this Court's terse *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam). *Munaf*, App. A at 5-6. Speaking for the panel majority, Judge Sentelle voiced dissatisfaction with "the logic of *Hirota*," "particularly as applied to U.S. citizens," and "acknowledged" that this Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), cast doubt on "*Hirota*'s continuing vitality." *Munaf*, App. A at 5-6. Nonetheless, the majority concluded that clarity on this issue must await action by this Court, which alone enjoys "the prerogative of overruling its own decisions." *Id.* at 6 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

Concurring in the judgment, Judge Randolph rejected the government's jurisdictional argument out of hand. He agreed with Mr. Munaf that citizenship and detention by U.S. forces were "critical" distinctions between this case and *Hirota*. *Munaf*, App. A at 7 (Randolph, J. concurring in the judgment); *see also id.* at 8 (extending *Hirota* to bar

habeas petitions filed by or on behalf of U.S. citizens "would contradict . . . the majority and dissenting opinions in *Rasul*"). Judge Randolph, however, would have denied relief on the merits based on grounds neither party had briefed in the courts below. *Id.* at 7-9.

On April 26, 2007, Mr. Munaf moved the Court of Appeals to stay issuance of its mandate pending the filing and ultimate disposition of this petition. The government opposed the motion on the basis that the petition was unlikely to be granted. On May 9, the court below granted Mr. Munaf's motion. The effect of that order is to preserve the Court of Appeals' interim injunction of December 15, 2006, preventing Mr. Munaf's transfer to Iraqi custody. *Munaf v. Geren*, No. 06-5324, Order (D.C. Cir. May 9, 2007).

REASON FOR GRANTING THE WRIT

THE COURT SHOULD GRANT THE WRIT BECAUSE THE LOWER COURT IMPROPERLY EXTENDED *HIROTA v. MACARTHUR* TO A U.S. CITIZEN IMPRISONED BY U.S. SOLDIERS AT A U.S. MILITARY PRISON.

A. Introduction

The significance of this case can hardly be gainsaid. The Executive Branch argues, and the lower court held, that although Congress has not suspended the Great Writ of Habeas Corpus for U.S. citizens, the United States military may nonetheless detain an American citizen in an overseas American prison indefinitely, or dispatch him to his death at the hands of another sovereign, with no

obligation to demonstrate the lawfulness of either his imprisonment or his threatened transfer.

So framed, this case presents questions of surpassing importance: Is the Executive constrained by the Constitution and laws of the United States in its treatment of U.S. citizens detained by U.S. officers at a U.S. prison overseas? And if so, can those citizens enforce those constraints in a federal court by way of habeas corpus? The ruling below, which cast into doubt the long-settled answers to these questions, demands prompt review.

The Court of Appeals held that the Executive need not account for Mr. Munaf's imprisonment or threatened transfer because he has been convicted by an Iraqi court and is being detained "by United States military personnel serving as part of the Multi-National Force-Iraq." *Munaf*, App. A at 2. The lower court did not elaborate on the relative significance of these two facts except to conclude that they brought his case within *Hirota v. MacArthur*, 338 U.S. 197 (1948) (*per curiam*). *Id.* In *Hirota*, the Court declined to entertain a collateral challenge brought by the former Japanese prime minister to his conviction by an international war crimes tribunal. *Hirota* was a nine sentence *per curiam* by a divided and incomplete Court.[5] It was issued three days after oral argument, cited no authority, and has *never* been relied on by this Court for any proposition.

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[5] Justice Murphy dissented without writing in *Hirota*; Justice Rutledge reserved his decision but died before announcing his vote; and Justice Jackson did not participate. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948). Justice Douglas concurred only in the result, believing the district court *would have had* jurisdiction over the case had it begun in a lower court. *Id.* at 203 (Douglas, J., concurring in the result).

The Circuit Court's decision has dangerously destabilized decades of settled precedent. Most importantly, it threatens to transform the legal landscape for U.S. citizens in U.S. custody. Almost sixty years ago, the Solicitor General asked the Court to deny habeas protections to U.S. citizens detained overseas. Unanimously, the Court refused. In the years that followed, the Court has consistently reaffirmed habeas as the preeminent protection of a citizen's physical liberty. The Circuit Court's decision casts this venerable doctrine in doubt.

At the same time, the lower court's proffered justification for its new rule introduces needless uncertainty into other settled areas of the law. According to the lower court, the bare fact of Mr. Munaf's foreign conviction, along with America's participation in the MNF-I, combine by some uncertain alchemy to strip a federal court of its power to examine the lawfulness of a citizen's detention and threatened transfer. But this simply makes no sense. As for the conviction, this Court has long recognized that a prisoner may use habeas to challenge the lawfulness of his threatened transfer to another sovereign, even in the shadow of a foreign conviction. And, as for American participation in the MNF-I, it is axiomatic that an executive agreement cannot authorize what the Constitution forbids. Executive membership in an international military force, therefore, cannot suspend the Great Writ for U.S. citizens.

The lower court went astray by extending *Hirota* to bar Mr. Munaf's habeas petition. Whatever argument may be made to deny the privilege of litigation to an enemy alien who attempts to mount a collateral challenge to his conviction by a foreign tribunal, it simply has no relevance to a direct challenge by a U.S. citizen to his detention and threatened transfer at the hands of his own countrymen.

The Court should grant *certiorari* and reverse the judgment below to prevent a dangerous erosion of the judiciary's power to hear habeas petitions from U.S. citizens detained abroad, and to prevent unnecessary ambiguities from distorting the settled law governing prisoner transfers and executive agreements.

B. Citizenship Has Been "A Head Of Jurisdiction" For Nearly Sixty Years.

In 1950, the Solicitor General asked the Court to hold that prisoners incarcerated overseas – whether citizen or alien – had no right to challenge their detention in habeas. The Court pointedly refused the invitation, drawing a distinction that has endured for nearly six decades. American citizens, the Court explained, enjoy a "status" distinct from "all categories of aliens":

> Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.

Johnson v. Eisentrager, 339 U.S. 763, 769-70 (1950); *see also* Brief of Petitioner at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (No. 306) (arguing that citizens as well as aliens held overseas should be denied access to courts). Decided two years after *Hirota*, *Eisentrager* conclusively put to rest any argument that U.S. citizens enjoy no greater protection than enemy aliens when they find themselves imprisoned abroad by their government.

The decades since *Eisentrager* have only solidified the Court's commitment to this principle. *See, e.g., Madsen v. Kinsella*, 343 U.S. 341 (1952) (entertaining habeas petition filed by U.S. citizen convicted and sentenced by a U.S.-controlled occupation court sitting in Germany); *Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality opinion) (adjudicating habeas petition from U.S. soldiers imprisoned in Japan); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (granting writ to former U.S. soldier who sought habeas while imprisoned in Korea); *McElroy v. Guagliardo*, 361 U.S. 281, 282 (1960) (granting writ to U.S. citizen who sought habeas while held in Morocco).

By 1973, this principle had achieved sufficient clarity that the Court could proclaim the following general rule with confidence: "Where American citizens confined overseas (and thus outside the territory of any district court) have sought relief in habeas corpus . . . , the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973) (internal citations omitted). For U.S. citizens held abroad, the only relevant jurisdictional inquiry is whether an *ultimate* custodian is in the territorial jurisdiction of the district court. *Id.*

The most recent links in this unbroken chain are *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004). In *Rasul*, eight Justices "explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction." *Munaf*, App. A. 7 (Randolph, J., concurring in the judgment). Writing for five Justices, Justice Stevens pointed out that a U.S. citizen could invoke the habeas statute to challenge his imprisonment at Guantánamo Bay, Cuba. *Rasul*, 542

U.S. at 481. Dissenting on the ground that the writ did not extend to foreign nationals at Guantánamo, Justice Scalia observed for himself and two other Justices "that United States citizens throughout the world may be entitled to habeas corpus rights, [which] is precisely the position that this Court adopted in *Eisentrager*. . . . " *Id.* at 502.

Rasul concerned foreign nationals. *Hamdi*, however, involved an American citizen seized by a multinational force within a theater of active military operations. 542 U.S. at 510 (plurality opinion) (noting that Hamdi was captured in Afghanistan by Afghan, not American, forces).[6] Hamdi was transferred to the physical custody of the U.S. military, and held first in Afghanistan, then at the Guantánamo Bay Naval Base, and ultimately at military brigs in Virginia and South Carolina. *Id.* Like Mr. Munaf, Hamdi filed a habeas petition seeking to vindicate "the most elemental of liberty interests – the interest in being free from physical detention by one's own government." *Id.* at 529. Not one Justice suggested even a possibility that jurisdiction was wanting. *Id.* at 539; *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting); *id.* at 585 (Thomas, J., dissenting).

Like Hamdi, Mr. Munaf is a U.S. citizen taken into U.S. custody in the course of an overseas multinational

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[6] The U.N. Resolutions that authorized multinational operations in Afghanistan mirror the Resolutions that established the multinational force in Iraq. *Compare* U.N. Resolution 1386 ¶ 1 (Dec. 20, 2001) (authorizing an "International Security Assistance Force" to maintain security in Afghanistan) *with* U.N. Resolution 1511 ¶ 13 (Oct. 16, 2003) (authorizing a "multinational force" to maintain security in Iraq); U.N. Resolution 1546 ¶ 10 (June 8, 2004) (authorizing the "multinational force" to take all necessary steps to maintain and stabilize Iraq).

military operation. Like Hamdi, Mr. Munaf was initially seized by an ally of the United States. J.A. 12. And like Hamdi, Mr. Munaf is in the present and actual custody of U.S. officers. *Munaf*, App. A at 2 (Munaf "is being held, in Iraq, by United States military personnel . . . "); *id.* at 7 (Randolph, J., concurring in the judgment) ("[Munaf] is held by American forces overseas.").[7] Quite literally, U.S. military officers hold the key to his cell. They alone have the authority to release him, should a U.S. court order it done. *Braden*, 410 U.S. at 495. Habeas jurisdiction requires nothing more.

This entire jurisprudence – from *Eisentrager* to *Hamdi* – developed *after Hirota*. And the panel majority freely "acknowledged" that the most recent decisions in this line – *Rasul* and *Hamdi* – cast "*Hirota*'s continued vitality" into doubt. *Munaf*, App. A at 6. Indeed, the majority candidly confessed that the logic of *Hirota* was in no way "clear or compelling, particularly as applied to American citizens." Yet because "*Hirota* did not suggest any distinction between citizens and non-citizens," the lower court concluded, reluctantly, that it was bound by the decision, leaving it to this Court to resolve the inconsistencies in the doctrine. *Id.* Judge Randolph, however, disagreed, tersely dismissing reliance on *Hirota*. "To

[7] The fact that Mr. Munaf is being held in Iraq while Hamdi was held in South Carolina does not alter the result. As *Eisentrager* and its progeny make plain, detention overseas does not alter the jurisdictional calculus for American citizens. *See supra* at 11-14. Further, as Justice O'Connor cautioned in *Hamdi*, granting access to U.S. courts for American citizens held within the country but denying it to American citizens held overseas would create a "perverse incentive" for the military to "simply keep citizen-detainees abroad." *Hamdi*, 542 U.S. at 524 (plurality opinion). And, in any event, the location of Mr. Munaf's detention was irrelevant to the lower court's jurisdictional logic.

extend *Hirota* to habeas petitions filed by American citizens," he warned, "would contradict *Eisentrager* and the majority and dissenting opinions in *Rasul*." *Id.* at 8 (Randolph, J., concurring in the judgment).

The net effect of the lower court's decision is to upend almost six decades of settled precedent. The Circuit Court has introduced dangerous uncertainty into the law by holding that a U.S. citizen imprisoned by his government may not challenge his detention in an American court – precisely the result sought by the Solicitor General and denied by the Court in *Eisentrager*. The lower court understood perfectly well that this result dramatically extended *Hirota* and created a conflict with more recent Supreme Court authority. But the Court of Appeals left it to this Court to restore clarity and predictability to the law. The Court should accept the lower court's invitation. It should grant certiorari to reaffirm a bedrock principle of our constitutional democracy: Unless Congress has suspended the writ, a U.S. citizen may always challenge the lawfulness of his detention at the hands of his countrymen.

C. Treating Mr. Munaf's Case As An Exception To The Rule Of Habeas Jurisdiction For Citizens Has Created Dangerous Uncertainty In The Law.

The panel majority believed that Mr. Munaf's conviction by an Iraqi court, combined with the U.S. government's participation in the MNF-I, distinguished his case from *Eisentrager* and its progeny and brought it within *Hirota*. *Munaf*, App. A at 2. But the lower court's struggle to bring Mr. Munaf's case within *Hirota* has produced a rule that simply makes no sense, even as it destabilizes previously settled doctrines.

a. By Making Habeas Jurisdiction Hinge On The Fact Of A Foreign Conviction, The Lower Court Ignored Settled Constitutional Principles And Introduced Needless Ambiguity Into The Law Of Prisoner Transfers.

With respect to American citizens, the habeas statute is unambiguous and unequivocal: The writ may be granted by "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," so long as the prisoner "is in custody under or by color of the authority of the United States," or "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §§ 2241(a), (c)(1), (c)(3). In this regard, the statute has been a bulwark of remarkable constancy. Since 1789 when it was passed by Congress in the First Judiciary Act, and through several legislative refinements, Congress has *always* given an American citizen the right to challenge the lawfulness of his detention by the Executive. Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 82. And nothing in this statute has ever remotely depended on the presence or absence of a foreign conviction.

Equally, the law is unmistakably clear that "in the absence of a conventional or legislative provision, there is no authority vested in any department of the government to seize a fugitive criminal and surrender him to a foreign power." *Valentine v. United States*, 297 U.S. 5, 9 (1936); *see also, e.g., Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he legal right to demand [a prisoner's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty") (collecting cases); *Quinn v. Robinson*, 783 F.2d 776, 782 (9th Cir.), *cert. denied*, 479 U.S. 882 (1986) ("[N]o branch of the

United States government has any authority to surrender an accused to a foreign government except as provided for by statute or treaty"); *Holmes v. Laird*, 459 F.2d 1211, 1219 n.59 (D.C. Cir.) ("It is certainly the law that the power of the Executive Branch to invade one's personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty."), *cert. denied*, 409 U.S. 869 (1972).

Because the Executive may not transfer a prisoner to another sovereign "in the absence of a conventional or legislative provision," *Valentine, supra*, federal courts have for centuries relied on habeas to test the lawfulness of a prisoner's threatened transfer. *See generally* M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 70-72 (4th ed. 2002) (citing cases); *see also, e.g.*, *Holmes v. Jennison*, 39 U.S. 540, 561-63 (1840) (granting writ of habeas corpus to prisoner wanted for extradition to Canada). For as long as it has applied this doctrine, the Court has understood that this inquiry may take place under the shadow of a foreign conviction. *See, e.g.*, *Terlinden v. Ames*, 184 U.S. 270 (1902) (defining extradition as "the surrender by one nation to another of an individual accused *or convicted* of an offence . . . ") (emphasis added). Indeed, it is frequently the very fact of the foreign conviction that triggers the demand for the prisoner's surrender. *See, e.g.*, *Holmes*, 459 F.2d at 1212, 1214 (describing Germany's demand for surrender of U.S. citizen convicted of attempted rape). Habeas jurisdiction in these circumstances is abundantly well settled.

The court below nevertheless cast this settled doctrine into disarray by making "the fact of a criminal conviction in a non-U.S. court [] a fact of jurisdictional significance under the habeas statute." *Munaf*, App. A at 6. And the

same court has solidified this rule by taking a complementary (but correct) position in another case. In *Omar v. Harvey*, No. 06-5126, Slip Op. (D.C. Cir. Feb. 9, 2007), another panel of the Court of Appeals held that a U.S. citizen detained in Iraq by American forces could challenge his detention in habeas because he had not been charged or convicted by an Iraqi court. *Id.* at 12-13.[8] As a consequence, the law in the D.C. Circuit reduces to this: U.S. citizens convicted by a foreign court may *not* challenge the lawfulness of their threatened transfer in an American courtroom, but citizens who have not yet been convicted may.

The government and Mr. Munaf agree on one point: this rule is simply irrational. *See* Appellant's Pet. for Reh'g and Reh'g En Banc at 11, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Mar. 26, 2007) (making jurisdiction turn on fact of a foreign conviction is "contrary to . . . common sense"). Under the rule adopted by the Court of Appeals, the District Court apparently had jurisdiction when Mr. Munaf filed his habeas petition in August 2006, but somehow lost it two months later when he was convicted. *Cf. Grupo Dataflux v. Atlas Global Group,* 541 U.S. 567, 570-71 (2004) (affirming long-standing time-of-filing rule for calculation of federal-court jurisdiction). The power of the federal judiciary, in other words, turns on the timing of a foreign tribunal's decision. This rule is not merely nonsensical – it also creates an intolerable incentive for the Executive to engage in precisely the sort of manipulations of a foreign tribunal that are alleged to have

[8] Mr. Omar and Mr. Munaf are represented by the same counsel.

occurred here. Nothing in the habeas statute supports this result.

Nor will the state of the law improve through additional percolation of the issue: U.S. prisoners have either been convicted by a foreign court or they have not. If they have not, the longstanding rule of *Eisentrager*, confirmed in *Omar*, prevails and the District Court has jurisdiction; if they have, or if they are convicted at *any* point in their habeas proceeding, including on appeal, the rule in *Munaf* prevails and the Court's jurisdiction is ousted. No further development of the doctrine in the D.C. Circuit – the sole effective forum for citizens detained overseas – can bring reason to this rule.[9]

The lower court candidly conceded that this result was irrational and confessed its inability to understand "why, in cases such as this," the mere fact of Mr. Munaf's conviction should deprive him of a forum to test the lawfulness of his detention and threatened transfer. *Munaf*, App. A at 6. Still, the court considered itself "constrained" by *Hirota*, where the petitioner had also been convicted by a foreign tribunal. *Id.* at 2. But there is a simple solution to the lower court's conundrum: *Hirota* did not turn on the mere fact of a foreign conviction; it turned on the fact that the petitioner tried to challenge that conviction in this Court.

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[9] Rules concerning citizens detained overseas, much like patent cases, will rarely if ever develop into circuit splits because all such cases are typically filed in one federal circuit. *Cf.* R. Stern, E. Gressman, and S. Shapiro, *Supreme Court Practice* § 4.21 p. 263 (8th ed. 2002) (because "conflict among and with other federal courts [in patent cases] has been virtually eliminated[,]" decisions about certiorari "now turn largely on the importance of the questions presented").

Bare recitation of *Hirota*'s facts reveals how far that case is from this, and why the Circuit Court's expansion of *Hirota* was wholly unwarranted. Koki Hirota was a former Foreign Minister and Prime Minister of Japan. He swore allegiance to the Imperial Emperor and held governmental posts through the barbarous Rape of Nanking. For his role in these atrocities, Hirota was convicted of war crimes after a trial before a panel of eleven international judges, a trial that lasted almost two years. Pet'n for Writ of Habeas Corpus at 22, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239). After his trial, Hirota attempted to mount a collateral challenge to the judgment and conviction of the foreign tribunal by seeking leave to file a habeas petition directly in this Court.

His petition contained three main arguments: that General MacArthur exceeded his constitutional authority in creating the international military tribunal; that the predicate acts for conviction were "beyond the scope and purview of the Japanese instrument of surrender"; and that the commission deprived him of the rights essential to a fair trial. *See* Pet'n for Writ of Habeas Corpus at 34, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239); Brief of Petitioner-Appellant at 18-22, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239) (tribunal deprived Hirota of right to cross-examine accusers, misapplied the rules of evidence, and ignored proscriptions contained in Bill of Attainder and *Ex Post Facto* Clauses of U.S. Constitution).

Hirota, in short, asked the Court to second-guess the legitimacy and operation of a foreign court. But it is axiomatic that an American court does not provide collateral review of the proceedings in a foreign tribunal. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004) ("the courts of one state will not question the validity of

public acts . . . performed by other sovereigns within their own borders, even when such courts have jurisdiction"); *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("[T]he courts of one country will not sit in judgment on the acts of the government of another done within its own territory."). In this respect, the result in *Hirota* is uncontroversial.[10]

By contrast, the litigation that Mr. Munaf commenced in the District Court stands on an entirely different footing. Though Mr. Munaf has been convicted by an Iraqi court, he does *not* challenge his foreign conviction or sentence. Instead, he challenges the legality of three specific actions taken or threatened *by his American jailers*: 1) holding him 24 months without legal justification;[11] 2) interfering in the Iraqi proceedings in order to create the conviction now relied upon by the government to strip the courts of jurisdiction;[12] and 3) delivering him to

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[10] Hirota's litigation suffered from a second fatal defect as well. As the lower court recognized, he sought leave to file directly in the Supreme Court. *Munaf*, App. A at 2; *see also Omar v. Harvey*, No. 06-5126, Slip Op. at 11 (D.C. Cir. Feb. 9, 2007) (*Hirota* was filed "as an original petition for habeas corpus"). But jurisdiction in that instance is either original or appellate. U.S. Const. Art. III, § 2, cl. 2. Hirota's litigation was neither, and the Court had no choice but to deny him leave to file his habeas petition.

[11] The Court of Appeals in *Omar* correctly recognized this distinction. *See Omar*, Slip. Op. at 12 (Omar "seeks not to collaterally attack a final international conviction, but only to test the lawfulness of his extrajudicial detention in Iraq, where he has remained in the control of U.S. forces for over two years without legal process.").

[12] It is well-established that the district courts will investigate on habeas corpus whether American officials have directed or participated in the ostensibly independent actions of a foreign sovereign. *See, e.g., Barr v. United States Department of Justice*, 819 F.2d 25, 27-28 (2d Cir. 1987) (U.S. government bears legal responsibility for actions that foreign government takes at its request); *Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 64 (D.D.C. 2004) (court has jurisdiction over habeas

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face execution by the Iraqi Government without the requisite judicial inquiry into whether that transfer is lawful.[13] While the outcome of these claims turns on

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petition filed by U.S. citizen held in Saudi Arabia to determine whether U.S. controls his detention).

In this case it is undisputed that Lt. Pirone purported to act on behalf of the Government of Romania at Mr. Munaf's trial. But it is sharply disputed whether he had any authorization from Romania to do so. *Compare* J.A. 52 (declaration of Robert M. Pirone stating he was authorized to act by the Romanian Embassy in Iraq) *with* J.A. 86 (Romanian "Embassy has not authorized any American official to represent the Romanian Government during the Iraqi judicial procedures") *and* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶21 (Mar. 5, 2007) ("Romanian representatives from the Embassy in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to US officer Robert Pirone.") (available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf; *and id.* at Annex 4 ("The Ministry of Justice never empowered any American official to represent Romania within the Iraqi legal proceedings concerning Mohammad Munaf and has no knowledge of the existence of such a delegation"). The district court must resolve this factual conflict on remand.

[13] *See Valentine, supra*; *Laubenheimer, supra*. In the District Court, the government conceded that no treaty or statute authorized Mr. Munaf's transfer to Iraqi custody. Arg. Tr., *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006) (No. 06-1455). In the Court of Appeals, Judge Randolph ignored that concession and opined that "the Congressional Authorization for Use of Military Force Against Iraq . . . in conjunction with United Nations Security Council Resolutions 1546 and 1637," provided sufficient legal basis for the transfer. *Munaf*, App. A at 8-9 (Randolph, J., concurring in the result) (citations omitted). Perhaps mindful of its concession below, the government did not advance such an argument in the lower courts, and Mr. Munaf has never had an opportunity to be heard on this matter. At a minimum, the lawfulness of Mr. Munaf's transfer raises complex questions that lie at the intersection of extradition law, treaty law, the laws of war, and customary international law, none of which was addressed by Judge Randolph in his hasty short-circuit of the judicial process. But Judge Randolph

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factual inquiries that the District Court must conduct on the merits, each claim falls squarely within the heartland of habeas.

In sum, the decision below introduces needless confusion into the law of prisoner transfers because it fails to recognize the difference between a collateral challenge to the judgment of a foreign tribunal and a direct challenge to the detention by American jailers. Oblivious to this difference, the Court of Appeals has made a citizen's right to the Great Writ turn on the timing of a foreign tribunal's judgment. The Court should grant review to restore reason to the doctrine.

b. Neither An Executive Agreement Nor A U.N. Resolution Can Suspend The Great Writ.

While the Court of Appeals placed principal reliance on the fact of Mr. Munaf's conviction, it also mentioned several times that Mr. Munaf's custodians were part of an international, or multinational, force. *Munaf*, App. A at 3, 4, 5. The lower court did not elaborate on the significance of this fact except to imply that it helped bring the case within an unexpressed penumbra of *Hirota*. *Id.* at 4 ("As in *Hirota*, Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court."). But the Executive's decision to participate in the MNF-I has no effect on the habeas jurisdiction of a federal court.

It is inherent in our constitutional democracy that our government cannot entreat with a foreign sovereign to do

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was correct in one respect: these issues go to the merits, and not to jurisdiction. They must be taken up on remand.

that which the Constitution forbids. In *Reid v. Covert*, 354 U.S. 1 (1957), for instance, the government argued that an executive agreement between the United States and Great Britain vested military courts with exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents. Pursuant to this agreement, the United States tried and convicted Covert before a military tribunal. *Reid*, 354 U.S. at 15-16 (plurality opinion).[14] Covert protested that the tribunal had not provided for trial by jury, in violation of the Sixth Amendment. Defending the conviction, the government invoked the executive agreement and argued that it prevailed over the Constitution. *Id.* at 16.

The Court emphatically disagreed: "The United States is entirely a creature of the Constitution. Its power and authority have no other source. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 5-6, 16. This part of the *Reid* plurality, of course, has long been the law. *See, e.g., Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize the national government "to do that which the Constitution forbids"); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) (treaty power cannot "authorize what the Constitution forbids").

At the same time, the Court has long held that the constitutional authority to suspend the writ lies in Congress, not the Executive. *See, e.g., Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety

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[14] *See* Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 354 U.S. 1, 16 n.29 (1957)).

should require the suspension of [habeas] ... it is for the *legislature* to say so") (emphasis added); *Hamdi*, 542 U.S. at 562 (Scalia, J., dissenting on other grounds) ("[S]uspension must be effected by, or authorized by, a legislative act."); *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (Taney, C.J.) (President has no power to suspend habeas).

The lower court turned these ancient doctrines upside down. If membership in the MNF-I contributes somehow to the outcome, as the lower court implies, then a unilateral determination by the Executive to participate in multilateral military operations could suspend the Great Writ for American citizens, even in the teeth of congressional opposition.[15] The Court should take review of this case to correct this dangerous distortion of settled separation-of-powers law.

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[15] Not even the government suggests that Congress has suspended the habeas writ for citizens. On the contrary, as the Court knows, in late 2006, Congress passed the Military Commissions Act, divesting the district courts of habeas jurisdiction over certain *alien* "enemy combatants." 28 U.S.C. § 2241(e)(1); Military Commissions Act of 2006, P.L. 109-366, 120 Stat. 2600 (Oct. 17, 2006). Conspicuously, the MCA *does not* apply to U.S. citizens – a point repeatedly emphasized by its drafters and supporters. During a floor debate in the Senate, for instance, Jon Kyl (R-AZ) insisted: "This legislation has nothing to do with citizens. The decision cited by the Senator from Pennsylvania is the *Hamdi* decision, which dealt with a U.S. citizen. *And, of course, the writ of habeas corpus applies to U.S. citizens.*" 152 Cong. Rec. S10243-01, S10267, 2006 WL 2771411 (Sept. 27, 2006) (emphasis added). Similar declarations echoed throughout the House. The "limitations on habeas corpus," California Representative Dan Lungren explained, "only apply to alien enemy combatants. . . . *[U]nder the expressed terms of the bill, an American citizen will have the unencumbered ability to challenge his or her detention as they have under the Constitution.*" 152 Cong. Rec. H7925-02, H7946, 2006 WL 2796911 (daily ed. Sept. 29, 2006) (emphasis added).

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the D.C. Circuit Court of Appeals. On review, the ruling of that court that the District Court lacked subject matter jurisdiction should be reversed, and the case remanded for further proceedings on the merits in the District Court.

Respectfully submitted,

JONATHAN HAFETZ
AZIZ Z. HUQ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
Telephone: (212) 998-6730
Facsimile: (212) 995-4550

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL, LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590
Facsimile: (215) 482-0874

JOSEPH MARGULIES
Counsel of Record
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890
Facsimile: (312) 503-1272

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713
Facsimile: (212) 665-2714

VINCENT MOCCIO
AMY MAGID
ROBINS, KAPLAN, MILLER & CIRESI
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioners

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APPENDIX A

482 F.3d 582

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued February 16, 2007 Decided April 6, 2007

No. 06-5324

MOHAMMAD MUNAF AND
MAISOON MOHAMMED, AS NEXT FRIEND OF MOHAMMAD MUNAF,
APPELLANTS

v.

PETE GEREN, ACTING SECRETARY OF THE U.S. ARMY, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 06cv01455)

Joseph Margulies argued the cause for appellants. With him on the briefs were Jonathan L. Hafetz, Aziz Z. Huq, Eric M. Freedman, and Susan L. Burke.

Gregory G. Garre, Deputy Solicitor General, U.S. Department of Justice, argued the cause for appellees. With him on the brief were Peter D. Keisler, Assistant Attorney General, Jeffrey A. Taylor, U.S. Attorney, David B. Salmons, Assistant to the Solicitor General, Douglas N. Letter, Litigation Counsel, and Lewis Yelin, Attorney.

Before: SENTELLE, RANDOLPH and KAVANAUGH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Opinion filed by *Circuit Judge* RANDOLPH, concurring in the judgment.

SENTELLE, *Circuit Judge*: Mohammad Munaf, an American citizen, traveled to Iraq in 2005. In October 2006 he was convicted on kidnapping charges and sentenced to death by the Central Criminal Court of Iraq ("CCCI"). He is being held, in Iraq, by United States military personnel serving as part of the Multi-National Force-Iraq ("MNF-I"). Munaf sought a writ of habeas corpus in the United States District Court for the District of Columbia, naming the Secretary of the Army and others as respondents. Soon after Munaf's conviction by the Iraqi criminal court, the district court held that it lacked jurisdiction and dismissed the petition. *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006). Munaf appeals. Constrained by precedent, we hold that the district court does not have the power or authority to entertain Munaf's petition and we therefore affirm.

Our result is required by the Supreme Court's decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948), as that decision has been applied by this court in *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), and interpreted by *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Feb. 9, 2007). In *Hirota*, Japanese citizens sought permission to file petitions for writs of habeas corpus directly in the United States Supreme Court. The petitioners were held in Japan, where they had been tried by a military tribunal authorized by General Douglas MacArthur acting as the Supreme

Commander for the occupying Allied Powers, *Hirota,* 338 U.S. at 198. In a short per curiam opinion the Supreme Court concluded that the sentencing tribunal "[was] not a tribunal of the United States" and held that "[u]nder the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." *Id.*

Flick involved a habeas petition filed in the United States District Court for the District of Columbia by a German citizen held in Germany by American forces after he was convicted by a military tribunal. 174 F.2d 983. Relying on *Hirota,* we framed the jurisdictional question as follows: "Was the court which tried and sentenced Flick a tribunal of the United States? If it was not, no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed on Flick." *Id.* at 984. Finding that the military tribunal was not a U.S. court, we held that the district court lacked jurisdiction to review Flick's habeas petition. *Id.* at 986.

Our recent decision in *Omar* involved a habeas petition filed on behalf of a United States citizen being held in Iraq by U.S. forces acting as part of the MNF-I. *Omar,* slip op. at 2. As in *Hirota* and *Flick*, *Omar* involved detention overseas and a multinational force. But unlike the petitioners in *Hirota* and *Flick,* Omar had not been charged or convicted by a non-U.S. court. We distinguished *Hirota* and *Flick* on this basis and went on to hold that the district court had jurisdiction to hear Omar's habeas claim. Slip op. at 12-14.

Unlike *Omar*, the instant case is controlled by *Hirota* and *Flick*. The MNF-I is a multinational force, authorized

by the United Nations Security Council, that operates in Iraq in coordination with the Iraqi government. The CCCI is an Iraqi criminal court of nationwide jurisdiction and is administered by the government of Iraq; it is not a tribunal of the United States. Accordingly, the district court has no power or authority to hear this case.

Munaf contends that *Hirota* and *Flick* do not control because, like Omar and unlike the petitioners in *Hirota* and *Flick*, Munaf is a United States citizen.[1] *See, e.g.*, *Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) (describing citizenship as "a head of jurisdiction and a ground of protection"). But Munaf's citizenship does not take his case out of the ambit of *Hirota* and *Flick*. *Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to the judgment of a non-U.S. tribunal. Indeed, Justice Douglas wrote a separate opinion criticizing the *Hirota* majority for seeming to foreclose habeas review even for American citizens held in such circumstances. *See* 338 U.S. at 204-05 (Douglas, J., concurring) (1949). In *Omar*, we held that "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal." Slip op. at 12. We explained that, because *Hirota* "articulates no general principle at all," the decision is controlling as a matter of precedent if the circumstances important to the Court's decision are present here. *Id.* at 11. As in *Hirota*, Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court. As we noted in *Omar*, conducting habeas proceedings in the face of such a conviction risks judicial second-guessing of a non-U.S. court's judgments

[1] Munaf was born in Iraq and was naturalized as a United States citizen in 2000.

and sentences, and we explained that *Hirota*'s repeated references to the petitioners' sentences "demonstrate [] that the Court's primary concern was that the petitions represented a collateral attack on the final judgment of an international tribunal." *Id.* at 12-13. Whether a habeas petition represents a collateral attack on a conviction by a non-U.S. court is not dependent on the petitioner's citizenship. In light of the precedent established by *Hirota*, specifically as interpreted in *Flick* and *Omar*, American citizenship cannot displace the fact of a criminal conviction in a non-United States court and permit the district court to exercise jurisdiction over Munaf's habeas petition.

Munaf also argues that he does not challenge his conviction by the Iraqi court but rather the lawfulness of his detention at the hands of United States military personnel. As with Munaf's citizenship argument, we do not think that *Hirota* and *Flick* can be distinguished on this ground. In *Hirota* and *Flick*, as in this case, U.S. forces who were operating as part of a multinational force detained the petitioners. And as in those cases, continued confinement is dependent on a conviction by a court not of the United States – specifically, a multinational tribunal in *Hirota* and *Flick* and, in this case, the CCCI, which is a foreign tribunal. The fact that the MNF-I is not an arm of the Iraqi government but rather cooperates with Iraq and its courts in matters of detention does not bring this case outside the scope of *Hirota*. Munaf states in his brief that "[e]ven if the Iraqi charges were dismissed tomorrow the United States does not suggest [Munaf] would be released." But the district court's jurisdiction to inquire into such matters is precisely the issue; if the charges were dismissed, and United States forces were to continue to hold Munaf, this would be a different case. Under *Omar*

the district court arguably *would* have jurisdiction over Munaf's habeas claim.[2] *See Omar*, slip op. at 14.

* * *

One final point deserves emphasis. In holding that the district court lacks jurisdiction, we do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens. In particular, Hirota does not explain why, in cases such as this, the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute. And as we acknowledged in *Omar*, the Supreme Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), are grounds for questioning *Hirota*'s continued vitality. *Omar*, slip op. at 9. But we are not free to disregard *Hirota* simply because we may find its logic less than compelling. "If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Id.* at 9 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

For the reasons discussed above, the judgment of the district court is

Affirmed.

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[2] Munaf's conviction was automatically appealed to the Iraqi Court of Cassation. At oral argument, Munaf's counsel stated that the status of that appeal is unclear.

RANDOLPH, *Circuit Judge,* concurring in the judgment.

I believe the district court had jurisdiction over Munaf's habeas corpus petition. The critical considerations are that Munaf is an American citizen and that he is held by American forces overseas. *Hirota v. MacArthur,* 338 U.S. 197 (1948) (per curiam), in which the habeas petitioners were Japanese citizens held in Japan, therefore does not apply. There is a longstanding jurisdictional distinction between citizens and aliens detained outside the sovereign territory of the United States. In *Johnson v. Eisentrager,* 339 U.S. 763, 781 (1950), decided two years after *Hirota,* the Court held that it lacked jurisdiction to issue writs of habeas corpus for German prisoners held by the United States in Germany. But the Court stated that its holding did not apply to American citizens, to whom the "Court long ago extended *habeas corpus*" when they were held outside the United States. *See id.* at 769-70 (citing *Chin Yow v. United States,* 208 U.S. 8 (1908)).

It is hardly surprising then that eight of the nine Justices in *Rasul v. Bush*, 542 U.S. 466 (2004), explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction. For himself and four other Justices, Justice Stevens wrote that "[a]liens held at the [Guantanamo Bay Naval] base, no less than American citizens, are entitled to invoke the federal courts' authority under [28 U.S.C.] § 2241." *Id.* at 481. Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, stated that "[n]either party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts," "[a]nd *that* position – the position that United States citizens throughout the world may be entitled to habeas corpus rights – is precisely the

position that this Court adopted in *Eisentrager* . . . even while holding that aliens abroad *did not have* habeas corpus rights." *Id.* at 497, 502 (Scalia, J., dissenting) (citation omitted).

It is true that *Omar v. Harvey*, No. 06-5126, slip op. at 12 (D.C. Cir. Feb. 9, 2007), distinguished *Hirota* and *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949), on the ground that in both cases the alien petitioners held overseas had been convicted by an international tribunal. But *Omar* did not speak to the jurisdictional issue confronting us here. To extend *Hirota* to habeas petitions filed by American citizens not only would contradict *Eisentrager* and the majority and dissenting opinions in *Rasul*, but also would constitute an unwarranted extension of an opinion that "articulates no general legal principle at all," *Omar*, slip op. at 11.

Habeas petitions test the legality of detention. The fact that the United States is holding Munaf because of his conviction by a foreign tribunal thus goes to the question whether he is entitled to the writ, not to the question whether the court has jurisdiction to consider the petition. *See Bell v. Hood*, 327 U.S. 678, 681 (1946). As to the merits, I believe *Wilson v. Girard*, 354 U.S. 524 (1957), is conclusive. After Japan indicted a United States soldier for killing a Japanese woman in Japan, the soldier sought a writ of habeas corpus in the United States District Court for the District of Columbia to prevent his transfer to Japanese authorities. *Id.* at 525-26. The district court denied the writ on the merits but issued a preliminary injunction against the soldier's transfer. *Girard v. Wilson*, 152 F. Supp. 21, 27 (D.D.C. 1957). Referring to a Security Treaty between the United States and Japan, the Supreme Court upheld the denial of the writ but reversed the grant

of the injunction, 354 U.S. at 530, reasoning that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction," *id.* at 529 (citing *Schooner Exchange v. M'Faddon,* 11 U.S. (7 Cranch) 116, 136 (1812)). In Munaf's case, the Congressional Authorization for Use of Military Force Against Iraq, Pub. L. No. 107-243, 116 Stat. 1498 (2002), in conjunction with United Nations Security Council Resolutions 1546, U.N. Doc. S/RES/1546 (June 8, 2004), and 1637, U.N. Doc. S/RES/1637 (Nov. 11, 2005), commands the same result. *Cf. Holmes v. Laird,* 549 F.2d 1211, 1219 n.59 (D.C. Cir. 1972).

APPENDIX B

456 F.Supp.2d 115

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAISOON MOHAMMED, *et al.*,	
Petitioners,	**Civil Action No. 06-1455 (RCL)**
v.	
FRANCIS J. HARVEY, *et al.*,	(Filed Oct. 19, 2006)
Respondents.	

MEMORANDUM OPINION

This matter comes before the Court on a motion[6] and supplemental motion [12] for temporary restraining order seeking injunctive relief pending the Court's review of a petition for writ of habeas corpus. [1] Upon consideration of the petition, the memorandum in support of the motion for temporary restraining order, the opposition and the reply thereto, the applicable law, the entire record herein, and after hearing argument, the Court dismisses the petition *sua sponte* for lack of subject matter jurisdiction. As such, the Court also dismisses the motion for temporary restraining order as moot. The Court's reasoning is set forth below.

I. BACKGROUND

The petitioner, Mohammad Munaf,[1] was born in Iraq in 1952 and became a United States citizen in 2000. Mohammed Decl. ¶¶ 2, 4, 7.[2] He is married to a Romanian woman, split residences between Romania and the United States from 1996 to 2001, and since 2001 has lived solely in Romania. *Id.* ¶¶ 5, 6, 9. In March 2005 he traveled from Romania to Iraq with several Romanian journalists. *Id.* ¶ 10. Shortly after their arrival, the group was kidnapped and held captive for almost two months by a group claiming to be the "Muadh Ibn Jabal Brigade." *Id.* ¶¶ 11-13. Their release was secured in May 2005 during a raid by military troops under the command of Multi-National Force-Iraq ("MNF-I"). Gardner Decl. ¶¶ 3-4.

MNF-I is a military force described as "a coalition authority consisting of approximately twenty-seven different nations that operates in accordance with the mandate of United Nations Security Council Resolutions (UNSCR) 1546 and 1637 (2005)." Gardner Decl. ¶ 2; *see also* Respondents' Opposition to Petitioners' Motion for a Temporary Restraining Order [9-1] ("Opp."), Ex. 2

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[1] The petition in this case was brought on behalf of Munaf by his sister, Maisoon Mohammed, as next friend. For ease of reference, the Court will use the singular "petitioner" to refer to Munaf.

[2] Ms. Mohammed's affidavit consists partly of matters within her personal knowledge and partly of hearsay statements. Petitioner also submits three declarations of Sean Riordan, a law student and legal intern for petitioner's American legal counsel, who speaks Arabic. These declarations consist of Riordan's accounts of his conversations, in Arabic, with one of petitioner's sisters, *see* First Riordan Decl. and Third Riordan Decl., and with petitioner's Iraqi lawyer, *see* Second Riordan Decl., both of whom are in Iraq. Portions of these declarations contain additional layers of hearsay. At this stage of the proceedings, the Court will consider all of the materials before it.

(Resolution 1546), Ex. 3 (Resolution 1637). Under this limited mandate, which is set to expire at the end of 2006 unless renewed, MNF-I operates "on behalf of and at the request of the Iraqi government" in Iraq. Gardner Decl. ¶ 2. MNF-I's power under the U.N. Resolutions includes the authority to detain prisoners who pose a threat to security in Iraq. MNF-I and the government of Iraq have agreed that MNF-I will maintain physical custody of prisoners awaiting criminal prosecution in Iraqi courts, as Iraq lacks much of the infrastructure necessary for maintaining its own prisoners. *Id.* ¶¶ 2-3; Opp. at 4.

Since the MNF-I raid, petitioner Munaf has been held as a prisoner by MNF-I troops at Camp Cropper, a military installation located at the Baghdad International Airport. Petition ¶ 3. It has been alleged that petitioner was a willing participant in a kidnapping-for-profit scheme, in that he posed as a kidnap victim and led the actual victims into a trap.[3] Gardner Decl. ¶¶ 4-5, 11-14. Petitioner maintains he is innocent of any criminal wrongdoing, and that he is not and has never been a member of al Qaeda in Iraq or any other terrorist group. Petition ¶ 22.

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[3] According to respondents, petitioner's role in the scheme was to travel to Iraq with the journalists, "ostensibly as their guide and translator and help facilitate the kidnapping." Gardner Decl. ¶ 13. The alleged "mastermind" of the plot would then negotiate the release of the Romanians, which would "increase his own stature" and help him "gain the support of the Romanian President Traian Basescu to develop new business in Romania." *Id.* ¶¶ 11-12. The kidnappers called themselves the "Muadh Ibn Jabal Brigade" and demanded payment of a ransom and that Romania withdraw its troops from Iraq. Mohammed Decl. ¶ 12.

Petitioner alleges that for the first five months of his detention, he was held incommunicado. Petition ¶ 4. Since then, he has had limited contact with his family and with an Iraqi attorney. *Id.* Two months after petitioner was taken into custody, he appeared before a three-person panel of MNF-I officers who conducted "a comprehensive review of Munaf's status and detention." Opp. at 7; Gardner Decl. ¶ 5. The panel interviewed witnesses and reviewed "available intelligence information." Gardner Decl. ¶ 5. Petitioner was present at the hearing and had an opportunity to hear the basis for his detention and to make a statement. *Id.* The panel found that petitioner should be considered a "security internee," as defined in U.N. documents, and should continue to be detained pursuant to MNF-I's U.N. mandate. *Id.*

Munaf's case was referred to the Iraqi government. Gardner Decl. ¶ 6. The government instituted criminal proceedings in the Central Criminal Court of Iraq ("CCCI"), an Iraqi court that is staffed by Iraqi citizens and applies Iraqi law. *Id.* ¶ 7. Munaf has appeared at four CCCI "Investigative Hearings," each time with his Iraqi attorney. *Id.* ¶ 15. At two of these hearings Munaf appeared as a witness against other defendants, and at the other two he appeared as the defendant in his own prosecution. *Id.* The Investigative Hearing Judge concluded that there was sufficient evidence to refer Munaf's case to the Trial Court as a defendant. *Id.* Respondents allege that Munaf has confessed his role in the kidnapping on camera, in writing, and in front of the Investigative Hearing Judge. Gardner Decl. ¶ 11. Munaf counters that any incriminating statements he made were coerced. First Riordan Decl. ¶¶ 8, 11. Specifically, petitioner alleges that he has been threatened by "U.S. and Romanian officials,"

and that unspecified "[o]fficials" told him that if he did not confess, he, his sister, and his wife would be sexually assaulted. *Id.*

Through his sister as next friend, Munaf petitioned in this Court for a writ of habeas corpus on August 18, 2006. The petition named as respondents Francis J. Harvey, the United States Secretary of the Army; Maj. Gen. William H. Brandenburg, Deputy Commanding General of Detainee Operations for Task Force 134, MNF-I; and one "Colonel Steele," first name unknown, who is the alleged Commanding Officer of Camp Cropper. The petition calls for issuance of a writ compelling respondents to allow Munaf access to attorneys of his choice, to "establish a lawful basis for Mr. Munaf's detention or release him from custody," and to enjoin his transfer to Iraq authorities. On September 8, 2006, petitioner moved for a temporary restraining order to prohibit respondents from transferring him to the custody of the government of Iraq, pending resolution of his habeas petition. A hearing on the motion was held on October 10, 2006.

On October 12, 2006, petitioner and his five codefendants appeared before a three-judge Trial Panel of the CCCI to face kidnapping charges under the Iraqi Penal Code. Pirone Decl. ¶ 3. Petitioner was accompanied by his Iraqi counsel and had the opportunity to "submit any evidence or bring any witnesses." *Id.* ¶ 4. Indeed, petitioner did make a statement, reiterating his position that he was innocent and that his prior confession was coerced. Second Riordan Decl. ¶ 9. Petitioner claims that two "United States military officials" attended the hearing. *Id.* ¶ 7. He alleges that one was an American soldier who told the court he was appearing at the request of the Romanian embassy to seek the death penalty for the defendants. *Id.*

Petitioner alleges that the other was an American general "who told the judge in open court that the defendants should all be convicted and sentenced to death," and that one "Judge Al-Rubaay" disagreed with the general.[4] *Id.* at ¶¶ 7-8. At one point, defendants and their counsel were removed from the courtroom. Petitioner claims that the "American military officials" then met with the judge for about 15 minutes. *Id.* ¶ 12.

Respondents explain that Robert Pirone, a Coast Guard Lieutenant who serves as an attorney at the CCCI Liaison Office in Baghdad, was present at the hearing in his capacity as a participant in MNF-I. Pirone Decl. ¶ 1. According to Pirone's sworn affidavit, Pirone appeared at the trial to make a formal complaint for the Romanian government about the kidnapping, whose victims were all Romanian.[5] *Id.* ¶ 7. Pirone was under oath at the trial, and his notarized authorization to represent the Romanian Embassy had been submitted to the court weeks before the trial. *Id.* In his affidavit, Pirone attests that his role at the trial was limited to answering questions about the case, based on prior confessions by the defendants, and to making the formal complaint, a requirement under Iraqi law. *Id.* Petitioner and his codefendants were allowed to make statements, and counsel for the prosecution and

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[4] While petitioner mentions only one judge who was present at the hearing, respondents have identified three judges who were present. *See* Second Riordan Decl. ¶ 5; Pirone Decl. ¶ 3. The use of a three-judge panel is consistent with the Trial Panel procedure previously described by respondents. Gardner Decl. ¶ 9.

[5] Romania participates in MNF-I. Opp. at 3 n.1.

defendants made arguments.[6] Second Riordan Decl. ¶¶ 9-10; Pirone Decl. ¶¶ 6-9. The Trial Panel questioned the defendants and called additional witnesses. Pirone Decl. ¶¶ 6-7.

Pirone attests that no other member of MNF-I participated in the trial in any way, and that any MNF-I personnel who were present were there only as observers or guards. *Id.* ¶ 8. There was no American general present, nor a general of any other MNF-I member nation. *Id.* Pirone states that when the courtroom was closed, he left the room and spent the entire recess talking with petitioner's attorney. *Id.* ¶ 10. He also says that no MNF-I personnel were with the judges while they deliberated. *Id.* When the hearing was reconvened, the court found petitioner and his five codefendants[7] guilty of kidnapping and sentenced them all to death.

A standard practice is followed when an MNF-I detainee is convicted of criminal charges by the CCCI. Gardner Decl. ¶ 17. First, the Trial Court issues an order to the Deputy Commanding General for Detainee Operations of MNF-I, who is a respondent in this case.[8] *Id.* In

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[6] Petitioner and four of his codefendants recanted their prior confessions before the Trial Panel, claiming they had been coerced. Second Riordan Decl. ¶ 9; Pirone Decl. ¶ 6.

[7] Munaf's codefendants were held in the custody of the Iraqi government and were never in the custody of MNF-I. Pirone Decl. ¶ 4.

[8] The habeas petition names as a respondent one "Major General William H. Brandenburg, Deputy Commanding General (Detainee Operations)/Commanding General, Task Force 134, Multi-National Force-Iraq." Respondents have identified the proper respondent as Major General John D. Gardner in his capacity as the "Deputy Commanding General for Detainee Operations (DCG-DO) Multi-National Force-Iraq." Gardner Decl. ¶ 1.

response, the Deputy Commanding General for Detainee Operations issues a transfer order releasing the detainee to an Iraqi Ministry of Justice facility. *Id.* It typically takes two to three weeks to process a transfer. *Id.* A defendant under sentence of death in Iraq has a statutory right to an automatic appeal to the Iraqi Court of Cassation. Pirone Decl. ¶ 13. The defendant has 30 days from the day after sentencing to submit material to the Court of Cassation. *Id.*

II. ANALYSIS

A. Standard for Reviewing Habeas Corpus Petition for Jurisdiction

"Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3). If a court determines that it lacks subject matter jurisdiction, it therefore is duty bound to dismiss the case on its own motion. In considering the legal sufficiency of the jurisdictional allegations in a petition for habeas corpus, the Court takes the petitioners' factual allegations as true, drawing all reasonable inferences in the petitioners' favor. *See Hawk v. Olson,* 326 U.S. 271, 272 (1945); *Phoenix Consulting, Inc. v. Republic of Angola,* 216 F.3d 36, 39 (D.C. Cir. 2000). But in determining its own jurisdiction, the Court is not limited to the allegations in the petition. *See Hohri v. United States,* 782 F.2d 227, 241 (D.C. Cir. 1986), *vacated on other grounds,* 482 U.S. 64 (1987). The Court may examine materials outside the pleadings as appropriate to determine whether it has jurisdiction over the subject matter. *See Herbert v. Nat'l Acad. of Sciences,* 974 F.2d 192, 197 (D.C. Cir. 1992).

Petitioner alleges that a "U.S. citizen detained in the custody of federal officials in violation of the Constitution, laws, or treaties of the U.S. unquestionably has the right to challenge that detention in federal court once personal jurisdiction over the petitioner's custodian is established." Petition ¶ 8. He alleges that he "is detained by U.S. officials at a detention facility known as Camp Cropper. The facility is under the control of the U.S. military and within the plenary and exclusive jurisdiction or dominion exercised in fact of the U.S." *Id.* ¶ 9. He contends that he is "in U.S. custody." *Id.* ¶ 21. Respondents counter that "[a]lthough United States Armed Forces participate in the detention [of detainees pending CCCI prosecutions], they do so not *qua* the United States but as part of their role in MNF-I." Opp. at 8.

B. Habeas Corpus Jurisdiction

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction[.]" *Kokkonen v. Guardian Life Ins. Co. of America,* 511 U.S. 375, 377 (1994). The principal source of jurisdiction alleged in this case is the habeas corpus statute applicable to the federal government, 28 U.S.C. § 2241 (2006). In pertinent part, it states that the:

> writ of habeas corpus shall not extend to a prisoner unless –
>
> (1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

> (2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States; or
>
> (4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or
>
> (5) it is necessary to bring him into court to testify or for trial.

28 U.S.C. § 2241(c). The application for the writ must "allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known." *Id.* at § 2242. If the writ is granted, it "shall be directed to the person having custody of the person detained," who can therefore "be required to produce at the hearing the body of the person detained." *Id.* at § 2243.

Under these terms, "[t]he turnkey of the habeas statute is the requirement of custody." *Abu Ali v. Ashcroft*, 350 F.Supp. 2d 28, 45 (D.D.C. 2004). A court has jurisdiction to issue the writ only if the petitioner is "in custody under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States," or other elements not relevant here. A central prerequisite for habeas relief is that the court must have the ability to force compliance by the petitioner's custodian, because "[t]he writ of habeas corpus does not

act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973). The identity of the custodian is crucial because the writ:

> is directed to, and served upon, not the person confined, but his jailor. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent, and if he fails to obey it, the means to be resorted to for the purposes of compulsion are fine and imprisonment.

In the Matter of Samuel W. Jackson, 15 Mich. 417, 439-40 (1867).

The Supreme Court has "very liberally construed the 'in custody' requirement for purposes of federal habeas." *Maleng v. Cook,* 490 U.S. 488, 492 (1989). For habeas jurisdiction to exist, the prisoner must be "held in actual or constructive custody by the respondents named in the petition, or by any other person or persons subject to the jurisdiction of the District Court." *United States ex rel. Keefe v. Dulles,* 222 F.2d 390, 392 (D.C. Cir. 1954). The converse must also be true: if the petitioner is in custody under some authority other than the United States, there is no habeas jurisdiction. For instance, where a U.S. citizen was held in a French jail by the authority of a French court, a U.S. court did not have jurisdiction over his habeas petition. *Id.* at 391 ("For obvious reasons, [petitioner] did not ask that the writ be directed to the foreign jailer.").

A prisoner is in the constructive custody of the United States when he is in the actual, physical custody of some person or entity who cannot be deemed the United States, but is being held under the authority of the United States or on its behalf. Constructive custody has been found in cases of actual custody between one state and another, *Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484 (1973) (prisoner in actual custody of state of Alabama found to be in constructive custody of Kentucky for habeas purposes); between a state and a private prison, *Stokes v. United States Parole Comm'n,* 374 F.3d 1234, 1238 (D.C. Cir. 2004), *Skelton v. Pri-Cor, Inc.,* 963 F.2d 100, 102 (6th Cir. 1991); between the United States and private individuals acting as its agent, *United States v. Jung Ah Lung,* 124 U.S. 621, 626 (1888) (petitioner held by harbormaster "in custody by direction of the customs authority of the port, under the provision of the Chinese restriction act," an act of Congress), *Chin Yow v. United States,* 208 U.S. 8 (1908) (petitioner held by manager of steamship company under similar authority); and between the United States and a foreign country that is used as the United States' "intermediary," *Abu Ali v. Ashcroft,* 350 F.Supp. 2d 28 (D.D.C. 2004).

The reach of the writ is not limited to the territorial jurisdiction of the United States courts where the immediate custodian is the United States. *See, e.g., Burns v. Wilson,* 346 U.S. 137 (1953) (finding jurisdiction over habeas claims by airmen detained under courts martial in Guam); *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955) (finding jurisdiction over habeas petition by ex-airman facing court martial in Korea). The ultimate territorial scope of the writ remains an open question.

That question need not be answered in this case, because petitioner fails on a threshold requirement: he is not being held "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States," as required under the habeas statute. Petitioner has alleged that he is "detained by U.S. officials" and "in U.S. custody." Petition ¶¶ 9, 21. But he is in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly, not from the United States acting alone. The United States has not asserted and does not profess to have the independent right to order that petitioner be moved, tried, punished, or released. Petitioner is thus under the actual, physical custody of MNF-I, a multinational entity separate and distinct from the United States or its army. He is in the constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him, and which controls his ultimate disposition. Petitioner thus has two custodians, one actual and the other constructive: MNF-I and the government of Iraq. Petitioner has not shown that either custodian is the equivalent of the United States for the purposes of habeas corpus jurisdiction.

1. Iraq as Custodian

Petitioner voluntarily entered the sovereign country of Iraq and has been convicted by the courts of that country for a violation of Iraqi law. The writ of habeas corpus will not reach to a foreign sovereign. *See, e.g., Duchow v. United States,* 1995 WL 425037 *1, *3, 95-cv-2121 (E.D. La. 1995) (U.S. citizen detained in Bolivia by Bolivian government not entitled to habeas relief). *See generally Ex*

parte Mwenya, [1960] 1 Q.B. 241 (summarizing evolution of British common law of habeas corpus, in which availability of the writ turns on the sovereign's control over the custodian). In exceptional cases where the United States acts through another country as an intermediary to hold a U.S. citizen, at the direction and under the ultimate control of the United States, the writ can be issued to the appropriate officials of the United States. *Abu Ali,* 350 F.Supp. 2d 28. But no evidence has been presented that the sovereign nation of Iraq is holding petitioner at the direction and under the ultimate control of the United States.

2. MNF-I as Custodian

It does not change the outcome to point out that Munaf is in the physical custody of U.S. troops in their capacity as participants in MNF-I. Where a U.S. citizen is detained under the authority of a multinational military entity, he is not in custody "under or by color of the authority of the United States," even if American military personnel play a role in his detention as part of their participation in that multinational force. Petitioner in this case is held by MNF-I, operating under international authority derived from the U.N. Resolutions. MNF-I has clearly asserted its authority over him by, for instance, conducting a hearing at which MNF-I determined that petitioner should be held as a security internee and that his case should be referred to CCCI.

In *Hirota v. General of the Army MacArthur,* 338 U.S. 197 (1948) (per curiam), Japanese citizens moved in the Supreme Court for leave to file habeas corpus petitions challenging their sentences under a military tribunal in

Japan. American military personnel participated in the tribunal, and the prisoners were in the physical custody of U.S. troops. General Douglas MacArthur, acting in his capacity as Supreme Commander for the Allied Powers, established the military tribunal "as the agent of the Allied Powers." *Id.* at 198. The Court denied the petitioners' motion because "the tribunal sentencing these petitioners is not a tribunal of the United States." *Id.* The Court traced the authority under which the tribunal acted and determined that it emanated from the multinational Allies and not the United States in its independent capacity. Because the prisoners were held under the authority of an entity that was "not a tribunal of the United States," the prisoners were not in the custody of the United States for purposes of habeas jurisdiction.

The rule recognized in *Hirota* was applied in *Flick v. Johnson,* 174 F.2d 983 (D.C. Cir. 1949), in which German citizens petitioned for habeas corpus to challenge their convictions by an Allied military tribunal in Germany following World War II. While the tribunal had been staffed by Americans and the petitioners were in the physical custody of American soldiers, the crucial question was the authority by which they were held: "If it was an international tribunal, that ends the matter." *Id.* at 985. Because the tribunal derived its authority from the Allies acting jointly in the immediate aftermath of the fall of Germany, it was not "a tribunal of the United States." Therefore "no court of this country has power or authority to review, affirm, set aside or annul the judgment and sentence imposed." *Id.* at 984.

Petitioner counters that the habeas applicants in those cases were not U.S. citizens. But nothing in *Hirota* or *Flick* purported to turn on whether the petitioners were

citizens. The courts were without jurisdiction because the petitioners were held under the authority of entities that were "not a tribunal of the United States." The identity of the custodian, and the concomitant lack of habeas jurisdiction, would remain the same regardless of the petitioners' citizenship. This is because, as stated previously, the writ acts upon the custodian, not the prisoner.

The fact that it is the identity of the custodian that matters most in this context, and not the citizenship of the prisoner, is demonstrated by *In re Yamashita*, 327 U.S. 1 (1946). There a Japanese commander petitioned for habeas corpus to challenge his sentence by a military tribunal in the Philippines. The Supreme Court traced the authority under which the tribunal was established: the authority emanated originally from the President of the United States as commander-in-chief, who directed the Joint Chiefs of Staff, who in turn commanded General MacArthur, acting in his capacity as "Commander in Chief, United States Arm [sic] Forces, Pacific," who in turn specifically ordered a U.S. Army general to establish the tribunal. *Id.* at 10. The tribunal derived its power entirely from the United States Executive and operated outside the framework of the Allied Powers. The Court found that there was habeas jurisdiction for a limited inquiry into the jurisdiction of the sentencing tribunal.

Hirota and *Yamashita*, taken together, recognized that General MacArthur acted in two capacities, as both an American and Allied commander, and evaluated the derivation of authority by which he and his subordinates held prisoners in custody. Therefore, prisoners who were in custody of the United States alone, under the sole

authority of the United States, could invoke habeas jurisdiction.[9] But prisoners who were held pursuant to the authority of the Allies, and who were in the physical custody of American soldiers acting as members of the Allied Powers, were in the custody of the Allies, not the United States, and therefore could not invoke the jurisdiction of the U.S. courts. *Flick* and *Madsen v. Kinsella,* 343 U.S. 341 (1952) are to the same effect for the European theater.

Petitioner claims that citizenship must have mattered in *Hirota* and *Flick* because there have been other cases where courts entertained habeas applications from citizens who were in the custody of the United States while it participated in a multinational force. But in each of these cases, the petitioner was held under the independent authority of the United States *qua* United States, not by a multinational force in which the United States participated. In all of those cases, the courts traced the authority of the custodian to its source to determine if the custodian was the United States or some other entity.

For instance, petitioner cites to *Madsen v. Kinsella,* 343 U.S. 341 (1952). In that case the Supreme Court found that there was jurisdiction to hear the habeas petition of a woman confined in a federal prison in West Virginia for

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[9] Courts have found jurisdiction to entertain habeas petitions from U.S. military personnel who were held or tried by American military tribunals or courts martial in various locations the world over. The jurisdiction has turned not on the location where the soldier was held, nor on the composition of the force in which he served – multinational or unilateral – but on the authority under which he was actually tried or held. *See, e.g., Burns v. Wilson,* 346 U.S. 137 (1953) (courts had jurisdiction over habeas claims of airmen tried by U.S. courts martial in Guam).

the murder of her serviceman-husband, whom she had killed in the American Occupied Zone of Germany shortly after World War II. She had been tried and sentenced in Germany by the "United States Court of the Allied High Commission for Germany" in 1950. This court, established unilaterally by the United States and with jurisdiction within the American zone of control, was a different court than the one at issue in *Flick*. It was a purely American creation and did not purport to exercise the authority of the Allies, and, moreover, petitioner was in custody in a United States federal prison in America.

Similarly, habeas jurisdiction was found to lie in the case of a former U.S. airman who was arrested by military officials in America and taken to Korea, where he was charged in a court martial with participating in a murder conspiracy in Korea during the Korean conflict. *United States ex rel. Toth v. Quarles,* 350 U.S. 11 (1955). Though America had participated in the Korean conflict under the auspices of a multinational United Nations force, the petitioner's court martial was an entirely American tribunal, established under the authority of an act of Congress.[10] Once again, the Court established at the outset that the tribunal derived its authority solely from the United States government. With the United States as custodian, habeas jurisdiction was proper, despite the fact that the prisoner and immediate custodian were in Korea.

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[10] Petitioner repeatedly conflates the authority by which U.S. troops operate within a military theater and the authority under which a prisoner is held. That the United States operates within a multinational military force does not cast all subsequent events in a multinational sheen. Thus courts must look to the substance of the matter and determine the source of authority for the detention.

Petitioner has argued that strong dicta in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), counsels a different result. After denying enemy aliens held abroad the right to sue in U.S. courts, the Supreme Court distinguished the rights of aliens from those of citizens, and opined that "[c]itizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection." *Id.* at 769. But in the very same paragraph, the Court identified two ways in which the courts protect citizenship: by issuing writs of habeas corpus to those in custody by the United States, and by hearing suits to declare a person a citizen "regardless of whether he is within the United States or abroad." *Id.* at 769-70. But the Court followed by noting that "[w]hen any citizen is deprived of his liberty by any foreign government, it is made the duty of the President to demand the reasons and, if the detention appears wrongful to use means not amounting to acts of war to effectuate his release." *Id.* at 770. The *Eisentrager* Court thus recognized that while citizenship may be a head of jurisdiction, it does not justify jurisdiction when the citizen is not held by the United States; the only remedies there are diplomatic, not judicial.

Most tellingly, *Eisentrager* recognized the distinction between custody by the authority of the United States and custody by the authority of a multinational entity. As the first matter it considered, the Court found that the petitioners were in the custody of a United States force that derived its authority solely from the United States, and that the "proceeding was conducted wholly under American auspices and involved no international participation."

Id. at 765. *Eisentrager* thus recognizes the threshold importance of determining the identity of the custodian.

Recent developments in the law of habeas corpus serve to confirm the holding in the instant case. *Rumsfeld v. Padilla,* 542 U.S. 426 (20004 [sic]), *Rasul v. Bush,* 542 U.S. 466 (2004), *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), and *Hamdan v. Rumsfeld,* 126 S.Ct. 2749 (2006), reiterate that the remedy provided by the writ of habeas corpus is expansive and not confined solely to U.S. citizens. But the one constant in all these cases is that the petitioners were in the custody of the United States alone, in its capacity as the United States, and not by any multinational force. While the prisoners may have been *captured* by a multinational force, they were transferred to the sole custody of the United States, and it was that detention they challenged. There is not even the slightest hint in any of these cases that another nation or multinational entity claimed control over the prisoners.

This is not to say that the United States military may purposefully evade the habeas jurisdiction of the courts, or otherwise deprive citizens of their rights, merely by cloaking its conduct in the guise of a multinational force.[11]

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[11] Military personnel who participate in MNF-I remain subject to the military justice systems of their respective countries. United Nations Security Council Resolution 1546 (2004), which authorized MNF-I, incorporates by reference a letter from Colin Powell, then the Secretary of State for the United States, in which Powell represents that "the MNF under unified command" is prepared to participate in the maintenance of security in Iraq. Opp., Ex. 2 at 11. Powell's letter states that "the MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel." *Id.* at 12. This language indicates that the participants in MNF-I retain court

(Continued on following page)

Nothing in today's holding is inconsistent with *Abu Ali v. Ashcroft*, 350 F.Supp. 2d 28 (D.D.C. 2004), which held that "the United States may not avoid the habeas jurisdiction of the federal courts by enlisting a foreign ally as an intermediary to detain the citizen." *Id.* at 41.

In *Abu Ali*, an American citizen was arrested and held in the Kingdom of Saudi Arabia by the Saudi government. But the citizen alleged, and "to some degree substantiated," that: (1) the United States initiated his arrest as part of an American criminal investigation; (2) the United States participated in interrogating him in the Saudi prison; (3) the United States controlled his detention in the Saudi prison; (4) the United States was keeping him in

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martial jurisdiction over their own personnel, rather than subjecting them to some sort of joint system of military justice. The letter cannot be read to suggest, as petitioner would have it, that the United States courts have subject matter jurisdiction over the habeas claims of prisoners who are guarded by U.S. forces operating within the framework of MNF-I. Taken as a whole and in context, Powell's letter clearly establishes that MNF-I is a distinct entity created to give the force "the status that they need to accomplish their mission," and that the letter simply reserves the military justice jurisdiction of each country "over their personnel."

Furthermore, while placing U.S. personnel under the unified command of a multinational force may result in the United States courts lacking jurisdiction over habeas corpus petitions by detainees held by the multinational force on foreign soil, this does not mean that American military personnel are completely removed from the control of the United States government when they are put under a multinational command. To the contrary, they remain under the direction of the Executive, subject to the oversight of Congress. *See* U.S. Const. Art. II § 2 (setting forth power of President as commander in chief of the armed forces and in foreign affairs, subject in appropriate cases to Senate approval); *id.* at Art. I § 8, cl. 11-16 (setting forth powers of Congress to declare war, "make rules concerning Captures on Land and Water," support and fund an army and navy, "make Rules for the Government and Regulation" of the armed forces, etc.).

Saudi Arabia to avoid constitutional scrutiny by American courts; and (5) Saudi Arabia would immediately release the citizen to United States officials upon a request by the United States government. *Id.* at 30-31. The United States did not offer any facts to rebut these allegations, which were substantiated by numerous affidavits and other documentary evidence "of varying degrees of competence and persuasiveness." *Id.* The court held that the citizen was entitled to limited jurisdictional discovery to determine whether he was being held in the actual or constructive custody of the United States. If the citizen could prove that he was being held "at the behest and ongoing direction of United States officials," he could invoke habeas jurisdiction. *Id.* at 67.

The court in *Abu Ali* noted that "[t]he instances where the United States is correctly deemed to be operating through a foreign ally as an intermediary for purposes of habeas jurisdiction will be exceptional, and a federal court's inquiry in such cases will be substantially circumscribed by the separation of powers." *Id.* at 41. Because the United States Executive was acting under its foreign affairs powers in *Abu Ali,* principles of separation of powers and international comity "place[d] considerable limitations on the inquiry (and authority) of a United States court in this setting." *Id.* at 49. The importance of recognizing the "considerable limitations" on a court's "substantially circumscribed" inquiry is especially apparent in this case, where the Executive acts not only under its foreign affairs powers, by dealing with dozens of allies and the United Nations, but also under its war powers.

Applying that "substantially circumscribed" inquiry to this case, it is clear that the United States is not "operating through" MNF-I "as an intermediary." In *Abu Ali* the

petitioner presented, and the United States did not attempt to rebut, substantial evidence that the petitioner was arrested and held by officials of the Kingdom of Saudi Arabia at the request of the United States, that America controlled his ultimate disposition, and that his immediate custodians had no independent interest in detaining him. In this case, petitioner offers little real evidence that the United States is using MNF-I as an "intermediary to detain the citizen." The habeas petition alleges that petitioner is "in U.S. custody," and does not allege that the United States is acting through some intermediary. In their briefs, petitioner's counsel merely handpick quotations from U.S. military leaders to imply that the United States has control over MNF-I. *See* Reply Memorandum in Support of Petitioners' Application for a Temporary Restraining Order [10-1] at 5-6 n.2.

Petitioner also submitted supplemental information regarding his hearing and sentencing before the Iraqi Trial Panel. *See generally* Second Riordan Decl. Therein, petitioner apparently attempts to allege that U.S. military personnel interfered with the Iraqi proceeding. This statement, which is disputed by respondents at every point, and which does not point to any evidence that the Americans were acting outside of their roles in MNF-I, falls far short of the kind of allegations that were required in *Abu Ali* to obtain jurisdictional discovery, let alone to establish jurisdiction. To the extent petitioner claims that the Americans interfered with the fairness of his trial, his remedies lie in the Iraqi courts. Petitioner has not alleged the kind of jurisdictional facts that would qualify this case as one of the "exceptional" instances where the United

States is acting through an intermediary to detain a citizen.[12] Given the paucity of allegations that petitioner is in the custody of the United States and not MNF-I, and the necessarily "substantially circumscribed" nature of the Court's inquiry, jurisdictional discovery is not warranted.

Finally, *Eisentrager* and *Rasul* strongly suggest that there are constitutional aspects to the right to habeas

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[12] This puts the Court at odds with the ruling in *Omar v. Harvey*, 416 F.Supp. 2d 19 (D.D.C. Feb. 13, 2006), whereby Judge Urbina issued injunctive relief to bar the transfer of an American citizen from MNF-I to Iraqi authorities. Judge Urbina held that the citizen, Omar, had pled sufficient jurisdictional facts to warrant injunctive relief. The "strong evidence that [Omar] is in the custody of the United States military" consisted of two e-mails from State Department employees to Omar's wife, saying that he was "under U.S. military care, custody and control" and that he was "under control of Coalition Forces (U.S. and MNF)." *Id.* at 25. The Court respectfully disagrees that the casual representations of a State Department employee provide a sufficient basis for what amounts to piercing the veil between the United States and an entity comprised of the United States acting jointly with its allies. For instance, in this case petitioner Munaf's sister claims that a State Department employee "confirmed that Mohammad [Munaf] was in U.S. custody" in a telephone conversation. Mohammed Decl. 14. By the logic of *Omar*, this statement would be allowed to trump the determination by the United States and its allies and the United Nations that the allied forces shall act jointly through the distinct entity of MNF-I. The government has been careless in its language, which sometimes reflects the reality that it is mostly U.S. troops who are carrying out the mission of MNF-I, and thus it is usually U.S. troops who are doing the physical "holding" of the petitioner. But it takes more than some offhand remarks by a few government officials to change the nature of a multinational force that has been created by the governments of over two dozen sovereign nations. Much more is required to establish habeas jurisdiction in the face of Supreme Court precedent respecting the distinction between the United States when it acts alone and when it acts as part of an allied force, as well as the "substantially circumscribed" nature of the Court's inquiry under *Abu Ali*.

corpus, whether or not they are embodied in the jurisdictional statute. To the extent that there remain constitutional aspects of the right which have not been covered by recent Supreme Court decisions, this does not change the outcome of this case. The right to habeas corpus embodied in the statute reflects the fundamental nature of the writ as captured in the Constitution and as it has survived for centuries in the common law. It is a right against the sovereign.

Courts have struggled to describe the scope of the right by reference to territorial bounds, citizenship, and the malleable meaning of custody itself. *See, e.g., Rasul,* 542 U.S. 466, nn.11-14 and accompanying text (collecting authorities on the territorial ambit of the writ at common law); *Ex parte Mwenya,* [1960] 1 Q.B. 241 (same); 1 Op. Atty Gen. 47 (1794) (Attorney General William Bradford opining that the writ extends to areas or entities within the sovereign control of the government). But at least one thing is constant about the right: it applies only against the sovereign that grants it. The petitioner here is challenging his detention on foreign soil, under the authority of a multinational force, at the request of a foreign government. "[P]rovisions of the Federal Constitution relating to the writ of habeas corpus, bills of attainder, ex post facto laws" and the like "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country," because there the citizen is treating with a foreign country, and our Constitution gives him rights only as against the United States. *Neely v. Henkel,* 180 U.S. 109 (1901). The same holds true of a duly constituted allied force, against which petitioner does not have constitutional rights. Whatever independent effect the habeas provision of the Constitution may have,

it does not grant petitioner the right to secure the writ against one who does not hold him in custody "under or by color of the authority of the United States" or "in violation of the Constitution or laws or treaties of the United States." The habeas provision of the Constitution therefore cannot expand the jurisdiction of the Court in this case beyond that granted by the statute.

In cases such as *Hirota,* the Supreme Court recognized that when the United States commits troops to a multinational, allied force, that force is a unique juristic entity distinct from the United States. The distinction between unilateral American action and multinational, allied action is no mere nicety or matter of form. It is a real distinction with real, substantive consequences. This distinction was summarized by Justice Jackson, in a separate memorandum, when he described his reluctance to vote for review of the claims in *Hirota:*

> On American initiative, under direction of the President as Commander-in-Chief, this country invited our Pacific allies, on foreign soil, to cooperate in conducting a grand inquest into the alleged crimes, including the war guilt, of these defendants. Whatever its real legal nature, it bears the outward appearance of an international enterprise, undertaken on our part under the war powers and control of foreign affairs vested in the Executive. For this Court now to call up these cases for judicial review under exclusively American law can only be regarded as a warning to our associates in the trials that no commitment of the President or of the military authorities, even in such matters as these, has finality or validity under our form of government until it has the approval of this Court. And since the Court's approval or disapproval cannot be

> known until after the event – usually long after – it would substantially handicap our country in asking other nations to rely upon the word or act of the President in affairs which only he is competent to conduct.

Hirota v. MacArthur, 335 U.S. 876, 878 (Jackson, J.) (Memorandum).[13] The United States has placed troops in Iraq under the unified command of a multinational force. It has not thereby placed that force and all its troops, whatever flag they may fly, under the strictures of the Constitution and the reach of this Court. There is evidence that this force is a true coalition over which no single nation has sovereignty, and petitioner has not demonstrated that it is a mere sham by which the United States seeks to avoid constitutional accountability. Petitioner is in a foreign country and in the custody of MNF-I, not the

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[13] Justice Jackson did not participate in the decision in *Hirota*, because of his involvement in the Nuremberg war crimes tribunal in Europe. He explained that his decision to break the tie and allow argument in *Hirota* stemmed from a desire to put to rest criticisms of the tribunal by America's enemies, and he did not express an opinion on the Court's jurisdiction. *Hirota v. MacArthur*, 335 U.S. 876 (1948) (Jackson, J.) (Memorandum). While petitioner in this case attempts to treat the Court's ruling in *Hirota* as an isolated case, it is worth noting that a divided Supreme Court declined to review numerous habeas petitions implicating dozens of petitioners in Germany following WWII, though four members of the Court wanted to hear argument on the jurisdictional issues raised by the petitions. Justice Jackson, who recused himself from the cases involving German petitioners, intervened to break the tie and secure review in *Hirota*. The precedential value of *Hirota* should thus be considered in light of the robust debate that centered around the issues at the time. *See generally* Charles Fairman, "*Some New Problems of the Constitution Following the Flag*," 1 STAN. L. REV. 587 (1949) (discussing post-WWII habeas petitions by German and Japanese prisoners).

United States, and he is therefore beyond the habeas corpus jurisdiction of this Court."

III. CONCLUSION

The Court is aware of the debate over the right of aliens to obtain the writ of habeas corpus, even when they are not held in the United States, and so it is aware that some will consider today's decision anomalous. But no court in our country's history, other than *Omar*, has ever found habeas corpus jurisdiction over a multinational force comprised of the United States acting jointly with its allies overseas. And the law is legend that in time of actual hostilities or war, as in Iraq, courts should tread lightly and give the President, as Commander-in-Chief, the full power of his office. The President has the power to "employ [the Nation's Armed Forces] in the manner he may deem most effectual to harass and conquer and subdue the enemy," *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850), and such decisions are "delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people

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" Petitioner also attempts to invoke jurisdiction under 28 U.S.C. §§ 1331, 1651, 2201, and 2202, Article I, § 9, cl. 2 and Article III of the Constitution, and the Due Process Clause of the Fifth Amendment. None of these provisions provide a proper basis for jurisdiction. Because the petitioner is in the custody of MNF-I, against whom no U.S. law secures him rights, he cannot point to a constitutional provision, law, or treaty of the United States that his case arises under, and thus he cannot invoke federal question jurisdiction. His invocation of the All Writs Act and Declaratory Judgment Act is unavailing because those remedial statutes presume jurisdiction and do not create it. Likewise, the constitutional provisions he cites do not independently create jurisdiction for him, nor for that matter do they secure any rights for him against his custodian, MNF-I.

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SUPREME COURT, U.S.

No. 06-1666

In the Supreme Court of the United States

MOHAMMAD MUNAF, ET AL., PETITIONERS

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
JONATHAN H. LEVY
LEWIS S. YELIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Petitioner, a dual Iraqi-United States national, has been tried and convicted by an Iraqi court of participation in a kidnapping-for-hire scheme in Iraq. During the pendency of the Iraqi government's criminal proceedings, petitioner is being held by United States military personnel who are serving as part of a multinational force acting under the authority of the United Nations Security Council and at the request of the Iraqi government. The questions presented are:

1. Whether the United States courts have jurisdiction to entertain petitioner's habeas corpus petition challenging his detention by the multinational force and seeking an injunction barring his transfer to Iraqi authorities upon completion of the Iraqi criminal proceedings.

2. Whether petitioner's claims and request for an injunction against his transfer to Iraqi authorities are otherwise justiciable and within the power of the courts.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Discussion 9
Conclusion 20

TABLE OF AUTHORITIES

Cases:

Bennett v. *Spear*, 520 U.S. 154 (1997) 17
Braden v. *30th Judicial Cir. Ct.*, 410 U.S. 484 (1973) 6
Hirota v. *MacArthur* (1948):
335 U.S. 876 18
338 U.S. 197 ..... 6, 7, 10, 11
Holmes v. *Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972) 9, 17
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 12
Neely v. *Henkel*, 180 U.S. 109 (1901) 14
Omar v. *Harvey*, 479 F.3d 1 (D.C. Cir. 2007), petition for cert. pending, 07-394 (filed Sept. 21, 2007) 8, 18
United States ex rel. Keefe v. *Dulles*, 222 F.2d 390 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955) 12
Wilson v. *Girard*, 354 U.S. 524 (1957) 9, 14, 15, 16

Resolutions and statute:

Res. 1546, U.N. SCOR, U.N. Doc. S/Res. 1546 (2004) . 2, 15
Res. 1637, U.N. SCOR, U.N. Doc. S/Res. 1637 (2005) 2
Res. 1723, U.N. SCOR, U.N. Doc. S/Res. 1723 (2006) 2

Statute—Continued: Page

Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 ..... 9, 15

§ 3(a)(2), 116 Stat. 1501 15

In the Supreme Court of the United States

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MOHAMMAD MUNAF, ET AL., PETITIONERS

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 482 F.3d 582. The opinion of the district court (Pet. App. 10-38) is reported at 456 F. Supp. 2d 115.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 2007. The petition for a writ of certiorari was filed on June 13, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Multinational Force-Iraq (MNF-I) is an internationally authorized entity consisting of forces from approximately 27 nations, including the United States. Pet. App. 11. It operates in Iraq at the request

of the Iraqi government and under a United Nations (U.N.) Security Council mandate authorizing it "to take all necessary measures to contribute to the maintenance of security and stability in Iraq." C.A. App. 30 (Res. 1546, U.N. SCOR, at 4, U.N. Doc. S/Res. 1546 (2004)).[1] The MNF-I is charged with, among other tasks, deterring and preventing terrorism and detaining individuals where necessary for imperative reasons of security. *Id.* at 36-37. Pursuant to its U.N. mandate, the MNF-I operates under the "unified command" of United States military officers, see *id.* at 30, but it is legally distinct from the United States, has its own insignia, and includes high-ranking officers from other nations (for example, the second in command, Lt. Gen. William Rollo, is a British officer).

Under the authority of the U.N. Security Council resolution, the Government of Iraq and the MNF-I agreed that the MNF-I would maintain physical custody of individuals suspected of criminal activity in Iraq pending investigation and prosecution in Iraqi courts under Iraqi law, because, among other reasons, many Iraqi prison facilities have been damaged or destroyed in connection with the ongoing hostilities. See Pet. App. 12. The MNF-I holds those individuals as security internees during Iraqi criminal proceedings, in accordance with the Security Council resolution and at the request of the Iraqi government. See C.A. App. 25-26. Thus, although the MNF-I maintains physical custody over criminal defendants, they are detained pursuant to the

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[1] That authority is subject to periodic review and reconsideration by the U.N. Security Council. The Security Council extended the MNF-I's mandate through December 2006, see Res. 1637, U.N. SCOR, U.N. Doc. S/Res. 1637 (2005), and again through December 2007, see Res. 1723, U.N. SCOR, U.N. Doc. S/Res. 1723 (2006).

MNF-I's U.N. mandate and under the authority of the Iraqi government (which prosecutes them under Iraqi law). *Ibid.*

b. The Central Criminal Court of Iraq (CCCI) is an Iraqi court under Iraqi governance, staffed by Iraqi judges who apply Iraqi law. Pet. App. 13. The CCCI is divided into two chambers: an investigative court and a felony trial court. C.A. App. 22. The investigative court conducts an investigative hearing, during which witnesses present sworn testimony, to determine whether there is sufficient evidence to warrant a criminal trial. *Ibid.* After evidence is presented, the investigative judge questions the defendant, who has a right not to respond. *Ibid.* If the investigative court determines that there is sufficient evidence to proceed, it forwards a report to the trial court and recommends charges. *Ibid.* The trial court sits in panels of three judges, who review the evidence submitted by the investigative court and may take additional evidence in formal proceedings. *Id.* at 23.

In both investigative and trial proceedings, a defendant is entitled to representation by court-appointed counsel or counsel of his choosing, and he may submit evidence and call supporting witnesses. C.A. App. 23, 51. If a defendant is convicted and sentenced to death, his case is automatically appealed to the Iraqi Court of Cassation. *Id.* at 54.

2. In March 2005, petitioner, a dual Iraqi-United States citizen residing in Romania, voluntarily traveled with several Romanian journalists to Iraq. C.A. App. 12. Ostensibly, petitioner was to serve as the journalists' translator and guide. *Ibid.* Shortly after their arrival in Iraq, however, the group was kidnapped and held captive for over two months. *Ibid.* In May 2005, MNF-I

troops freed the captives during a military raid and detained petitioner because they suspected that he was involved in the kidnapping. *Id.* at 21.

In July 2005, a tribunal of three MNF-I officers conducted a comprehensive review of petitioner's status and detention. C.A. App. 21. Petitioner was present at the hearing, and he had an opportunity to hear the basis for his detention, make a statement, and call immediately available witnesses. *Ibid.* The panel determined that petitioner was a security internee who should continue to be detained for imperative reasons of security, in accordance with the MNF-I's U.N. mandate. *Ibid.* The MNF-I subsequently referred petitioner's case to the CCCI for investigation and possible trial. *Id.* at 22. That referral is consistent with the manner in which the MNF-I has treated other security internees being held by the MNF-I under international authority. *Ibid.*

Petitioner admitted on camera, in writing, and in front of the Iraqi investigative court that he participated as an accomplice in the kidnapping for profit of the Romanian journalists. C.A. App. 23. Petitioner also appeared as a witness against his accomplices, including his brother-in-law. *Id.* at 23, 25. In those hearings, petitioner identified the other kidnappers and admitted his role in the scheme. *Id.* at 25. Petitioner was represented by counsel of his choice at the hearings, and was afforded the opportunity to present evidence and call witnesses. *Id.* at 51. The Iraqi investigative court determined that there was sufficient evidence to proceed, and it referred the case to the trial court. *Id.* at 25.

A United States military officer, who is a member of the MNF-I, appeared in the trial court at the request of the Romanian government to make a formal complaint against petitioner and his codefendants, as is customary

under the inquisitorial system. C.A. App. 52. Weeks before he made the complaint, the officer filed with the trial court a formal letter from the Romanian Embassy authorizing him to make the complaint on Romania's behalf. *Ibid.*

During the trial, petitioner and his codefendants recanted the confessions they had made in the investigative court, alleging that Iraqis or Romanians had forced them to confess. C.A. App. 52. Although petitioner has been in MNF-I custody since his capture, neither petitioner nor any of the other defendants alleged that the MNF-I had coerced their confessions. *Id.* at 52.

At his trial in the CCCI, petitioner and his attorneys again had the opportunity to present evidence and call witnesses. Pet. App. 14. After considering the evidence gathered by the investigative court, taking additional statements from the defendants, and hearing argument from the Iraqi prosecutor and multiple defense attorneys, the trial court found petitioner and his five codefendants guilty of kidnapping and sentenced them to death. C.A. App. 51-53.

An automatic appeal to the Iraqi Court of Cassation is pending. See C.A. App. 54. The MNF-I is continuing to hold petitioner on behalf of the Iraqi government until the resolution of his appeal in Iraq. (Because the court of appeals granted an injunction pending appeal and later stayed the issuance of its mandate pending the disposition of petitioner's certiorari petition, respondents may not transfer petitioner to the Iraqi authorities while that petition is pending before this Court.).[2]

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[2] Relying entirely on hearsay evidence, petitioner suggests that the United States military officer who represented Romania in the CCCI proceeding "met *ex parte* with the presiding Iraqi judge for approximately fifteen minutes" and that "[i]mmediately thereafter, that judge

3. Petitioner, through his sister as next friend, filed this habeas corpus action seeking, among other things, his release from custody and an order barring his transfer to Iraqi custody. Pet. App. 14.

The district court dismissed this habeas action for lack of subject matter jurisdiction. Pet. App. 10-38. The court explained that custody is a critical factor in establishing habeas jurisdiction because "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him." *Id.* at 19-20 (quoting *Braden* v. *30th Judicial Cir. Ct.*, 410 U.S. 484, 494-495 (1973)).

The district court determined that petitioner is not in the custody of the United States, but instead is "in the [physical] custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly," as well as in the "constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him." Pet. App. 22. With regard to Iraq, the court emphasized that "[t]he writ of habeas corpus will not reach to a foreign sovereign," and here, "[p]etitioner voluntarily entered the sovereign country of Iraq and has been convicted by the courts of that country for a violation of Iraqi law." *Ibid.*

Relying on *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam), the district court further held that "[i]t does not change the outcome to point out that [petitioner] is in the physical custody of U.S. troops in their

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convicted and sentenced [petitioner] to die." Pet. 7 (citing C.A. App. 49 (affidavit of law student reporting conversation conveyed to him)). The officer has affirmed unequivocally, however, that "[a]t no time during the trial was I present in the courtroom with members of the court when defense counsel were not also present." C.A. App. 53.

capacity as participants in MNF-I." Pet. App. 23. In *Hirota*, Japanese citizens filed motions in the Supreme Court for leave to file habeas petitions challenging their sentences by a military tribunal in Japan. 338 U.S. at 198. As the district court here noted, "American military personnel participated in the tribunal, and the prisoners were in the physical custody of U.S. troops." Pet. App. 24. In his capacity as Supreme Commander for the Allied Powers, United States General Douglas MacArthur established the tribunal "as the agent of the Allied Powers." *Ibid.* (quoting *Hirota*, 338 U.S. at 198). The Supreme Court denied the petitioners' motions because "the authority under which the tribunal acted * * * emanated from the multinational Allies and not the United States in its independent capacity." *Ibid.* Accordingly, the district court explained, the tribunal in *Hirota* was "not a tribunal of the United States," and the prisoners were not in the custody of the United States. *Ibid.* (quoting *Hirota*, 338 U.S. at 198).

The district court rejected petitioner's attempt to distinguish *Hirota* on the ground that it did not involve the detention of a United States citizen. Pet. App. 24-25. The court explained that *Hirota* turned on the fact that "the petitioners were held under the authority of entities that were 'not a tribunal of the United States,'" and "[t]he identity of the custodian, and the concomitant lack of habeas jurisdiction, would remain the same regardless of the petitioners' citizenship." *Id.* at 25 (quoting *Hirota*, 338 U.S. at 198).

The district court also rejected petitioner's contention that the United States merely used the MNF-I as an intermediary to carry out its wishes. Pet. App. 29-32. It explained that "[t]here is evidence that this force is a true coalition over which no single nation has sover-

eignty, and petitioner has not demonstrated that it is a mere sham by which the United States seeks to avoid constitutional accountability." *Id.* at 36.

4. The court of appeals affirmed. Pet. App. 1-9.

a. The court of appeals held that dismissal was required by *Hirota* and subsequent District of Columbia Circuit precedents because neither the MNF-I nor the CCCI is "a tribunal of the United States." Pet. App. 2, 3-4. Like the district court, the court of appeals explained that "*Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to a judgment of a non-U.S. tribunal." *Id.* at 4. Rather, the court determined, "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal." *Ibid.* (quoting *Omar* v. *Harvey*, 479 F.3d 1, 7 (D.C. Cir. 2007), petition for cert. pending, No. 07-394 (filed Sept. 21, 2007)). "As in *Hirota*," the court explained, "[petitioner's] case involves an international force, detention overseas, and a conviction by a non-U.S. court." *Ibid.* "[C]onducting habeas proceedings in the face of such a conviction," the court continued, "risks judicial second-guessing of a non-U.S. court's judgments and sentences." *Id.* at 4-5.

The court of appeals rejected petitioner's contention that he challenged only the lawfulness of his detention, as opposed to his Iraqi conviction. Pet. App. 5-6. It explained that petitioner is detained by a multinational force and his continued detention depends on his Iraqi conviction. *Id.* at 5. "[I]f the charges were dismissed, and the United States forces were to continue to hold" petitioner, the court stated, "this would be a different case" under the *Omar* decision. *Ibid.*

b. Judge Randolph concurred in the judgment. Pet. App. 7-9. He concluded that the district court had juris-

diction because petitioner "is an American citizen * * * held by American forces overseas." *Id.* at 7. Nevertheless, Judge Randolph would have denied the habeas petition and request for an injunction against transfer on the merits because "the United States is holding [petitioner] because of his conviction by a foreign tribunal." *Id.* at 8.

Judge Randolph concluded that this case is governed by this Court's decision in *Wilson* v. *Girard*, 354 U.S. 524 (1957), where the Court set aside an injunction against the transfer of an American soldier within Japan to Japanese authorities to face charges stemming from a shooting in Japan. In *Wilson*, Judge Randolph recognized, this Court reaffirmed that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." Pet. App. 9 (quoting *Wilson*, 354 U.S. at 529). Pointing to the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, and the U.N. Security Council Resolutions establishing the MNF-I, Judge Randolph concluded that *Wilson* compels dismissal of this habeas action and request for an injunction against transfer. See Pet. App. 9 (citing *Holmes* v. *Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 889 (1972)).

DISCUSSION

The court of appeals correctly held that United States courts lack jurisdiction to adjudicate petitioner's detention by a multinational force operating in a foreign nation pursuant to international authority. Even if United States courts had such jurisdiction, petitioner's action and, in particular, his request for an injunction

against transfer to Iraqi authorities, would be non-justiciable under the separation-of-powers and international-comity doctrines. This habeas petition amounts to an impermissible collateral attack on petitioner's conviction by an Iraqi court based on serious criminal conduct that petitioner—a dual Iraqi citizen—committed in Iraq in violation of Iraqi law. The United States courts lack authority to accommodate such attacks.

Although the court of appeals correctly resolved this case, the basic questions presented are exceptionally important. The same basic questions, however, are presented by the government's petition for a writ of certiorari in *Geren* v. *Omar*, No. 07-394 (filed Sept. 21, 2007). *Omar* provides a better vehicle for considering the full set of issues concerning the authority of the United States courts to entertain habeas petitions filed on behalf of individuals detained abroad by a multinational force acting under international authority. Accordingly, this Court should hold the petition for a writ of certiorari in this case and dispose of it as appropriate in light of its disposition of *Omar*. Alternatively, the Court could grant both petitions and consolidate the cases for oral argument.

1. As explained in the government's petition for a writ of certiorari in *Omar* (at 11-16), the threshold jurisdictional question presented by this habeas action is governed by *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam). In both this case and *Hirota*, the habeas petitioners were in the physical custody of United States military officers, but those officers acted as part of a multinational force under international authority. Here, the United Nations, the United States, and the 26 other nations participating in the multinational force all view the MNF-I as having a distinct identity from the forces

of any particular nation. There is no basis for a United States court to countermand that judgment and disregard the MNF-I's international origin and authority.[3]

Petitioner argues (Pet. 12-16) that the United States courts nonetheless have jurisdiction over his habeas petition because he is a United States citizen detained by United States military personnel. As Justice Douglas recognized in his concurring opinion in *Hirota*, however, the rationale of *Hirota* does not lend itself to a citizenship exception. 338 U.S. at 202-203, 205; see Pet. App. 4 ("*Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to the judgment of a non-U.S. tribunal.").

The cases on which petitioner relies (Pet. 13) in arguing to the contrary are inapposite because, as the district court observed, they involve "petitioners * * * in the custody of the United States alone, in its capacity as the United States, and not by any multinational force" acting under international authority. Pet. App. 29. Citizenship, in itself, does not create jurisdiction when a United States national is held abroad under international authority. If it did, United States courts could entertain habeas actions brought by citizens detained pursuant to foreign convictions. But it is beyond dispute that such jurisdiction is lacking. The same basic principle that prevents a United States citizen from filing a habeas petition in the United States courts challenging

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[3] Petitioner misses the point by arguing (Pet. 26) that "a unilateral determination by the Executive to participate in multilateral military operations [cannot] suspend the Great Writ for American citizens." The question is not whether the writ has been suspended (it has not); rather, the question is whether it has any application to custody by a multinational force operating abroad under international authority, and under *Hirota* it does not.

his detention in a French prison under French law (see *United States ex rel. Keefe* v. *Dulles*, 222 F.2d 390 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955)) prevents him from challenging his detention pursuant to the international authority at issue.[4]

Johnson v. *Eisentrager*, 339 U.S. 763 (1950), to which petitioner points (Pet. 12-13), does not compel a different result. In that case, the Court observed that citizenship is a "head of jurisdiction," 339 U.S. at 769, but that statement was made in the context of a case in which the habeas petitioners (who were not United States citizens) were indisputably being held under the exclusive authority of the United States. Indeed, this Court went out of its way to note at the outset of its decision that "[t]he proceeding [pursuant to which the habeas petitioners were detained] was conducted wholly under American auspices." *Id.* at 766. Accordingly, *Eisentrager* does not compel the exercise of jurisdiction in this case, where the habeas petitioner is being detained abroad by a multinational force under international authority.

There is no question that, despite petitioner's United States citizenship, United States courts would lack jurisdiction to entertain his habeas petition if he were already in Iraqi custody pursuant to his criminal convic-

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[4] Petitioner asserts (Pet. 4) that the government conceded in *Omar* that Omar is under the authority and control of the United States. That is incorrect. As the government has consistently argued throughout this litigation and the *Omar* case, both petitioner and Omar are in the custody of the MNF-I, which is a distinct, multinational entity that operates under the unified command of the United States pursuant to the U.N.'s mandate, just as the Allied Powers operated under General MacArthur's command in *Hirota*. See Pet. at 12 n.3, *Omar*, *supra* (No. 07-394).

tion for conduct in Iraq. The result is no different where, as here, United States forces are simply holding petitioner during the Iraqi criminal proceedings against him as part of a multinational force acting under international authority and at the request of the Iraqi government. In any event, because *Omar* also involves a United States citizen, questions concerning the relevance of United States citizenship are squarely presented by the government's petition in that case.

2. Even if the United States courts had subject matter jurisdiction, the judgment of the court of appeals would be correct because petitioner is not entitled to the extraordinary relief he seeks, as Judge Randolph concluded in his concurring opinion.

Like Omar, petitioner voluntarily traveled to an active combat zone in Iraq and committed criminal offenses there. If petitioner should not be detained in Baghdad by United States troops in their role as part of the MNF–I, or should not be transferred at the appropriate time to Iraqi authorities, those are decisions to be made by the Executive Branch based on military and foreign policy determinations that would be heavily influenced by the judgments of United States officials on the ground in Iraq in the midst of the war there. Respondents are not aware of any judicial decision (other than *Omar*) overriding the military's determination of how to deal with an individual captured in an active combat zone abroad who is determined to pose a security threat to United States forces and local authorities and residents alike. See Pet. App. 37. And the United States courts lack authority to grant such relief, as the government's petition in *Omar* explains (at 17-22, 24-25).

Moreover, exercise of habeas jurisdiction in this case is barred by principles of international comity. Like

Omar, petitioner seeks to enjoin respondents from turning him over to the custody of the Iraqi government. C.A. App. 18-19. He even seeks an order requiring the United States to remove him from Iraq and bring him to this country. *Ibid.* As the government's *Omar* petition explains (at 18-22), that is not the sort of relief available in habeas, and it is inconsistent with overriding principles of comity. Indeed, as this Court long ago observed, an American citizen "cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States." *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901).

While petitioner cites authority (Pet. 17-18) for the proposition that the Executive's *extradition* of a person from the United States to another country requires treaty or statutory authorization, and is therefore subject to limited judicial review, petitioner is already in Iraq, having traveled there voluntarily. As such, this case does not involve an extradition and the Executive has discretion—backed by both statute and the Nation's international commitments, see note 5, *infra*—to determine whether to surrender him to Iraqi authorities for criminal proceedings and punishment under Iraqi law. See Pet. at 17-20, *Omar, supra* (No. 07-394).

As Judge Randolph determined, this Court's decision in *Wilson* v. *Girard*, 354 U.S. 524 (1957), is "conclusive" in that regard. Pet. App. 8. In *Wilson*, this Court upheld the Executive's discretion, in the absence of a contrary treaty or statute, to surrender a United States soldier in Japan to Japanese authorities for criminal prosecution based on a crime that he allegedly committed in Japan. 354 U.S. at 529-530. Because Iraq has not

surrendered its jurisdiction over criminal offenses committed within Iraq, and because no treaty or statute bars petitioner's transfer to Iraqi authority, *Wilson* controls here. Any order by a United States court that interferes with petitioner's continued detention while his Iraqi criminal appeal is pending, or that prohibits his transfer to Iraqi custody after his appeal (should that be unsuccessful), would impermissibly interfere with the sovereign acts of a foreign nation. See Pet. at 17-22, 24-25, *Omar, supra* (No. 07-394).[5]

3. The foregoing separation-of-powers and international-comity concerns are even more pronounced in this case than in *Omar* because petitioner is a dual Iraqi-United States citizen who has already been tried *and convicted* by an Iraqi court. Petitioner's Iraqi citizenship distinguishes this case and heightens the comity concerns inherent in preventing Iraq from punishing him for crimes he committed in that country.

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[5] While the government's principal submission is that no treaty or statutory authority is required for the MNF-I to transfer petitioner within Iraq to Iraqi custody, the government does not concede, as petitioner asserts (Pet. 23 n.13), that no statute authorizes the transfer. Rather, the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498, authorizes United States forces to "enforce all relevant United Nations Security Council resolutions regarding Iraq," Pub. L. No. 107-243, § 3(a)(2), 116 Stat. 1501, and U.N. Security Council Resolutions 1546 and 1637 call on the MNF-I to establish a security partnership with the Government of Iraq and to coordinate with it on matters of security, see, *e.g.*, Res. 1546, U.N. SCOR, para. 11, U.N. Doc. S/Res. 1546 (2004). As Judge Randolph recognized, those provisions provide any authority needed for United States forces, acting as part of the MNF-I, to transfer a security internee like petitioner within Iraq to Iraqi custody. Pet. App. 8. In any event, as *Wilson* makes clear, the burden is on petitioner to identify a treaty or statute *barring* such a transfer, see 334 U.S. at 529-530, and he has not done so.

Even setting petitioner's Iraqi citizenship to the side, his habeas petition amounts to an impermissible collateral attack on his foreign conviction. A "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its own borders." *Wilson*, 354 U.S. at 529. Thus, as petitioner concedes (Pet. 21), "it is axiomatic that an American court does not provide collateral review of the proceedings in a foreign tribunal."[6]

Petitioner's contention (Pet. 22) that he is not attacking his Iraqi conviction is contradicted by the record. In his filings below, petitioner argued that he had been convicted and sentenced "by an Iraqi court operating under glaring procedural deficiencies and the direct manipulation of U.S. military personnel." Docket Entry No. 12, at 1 (D.D.C. Oct. 13, 2006); see *id.* at 3 ("The proceeding's gross procedural deficiencies and manipulation by U.S. military officials highlights the vital importance of this Court's habeas corpus review."). In this Court, petitioner continues to assert (Pet. 22 & n.12) that those proceedings were improperly influenced by the United States—a contention the United States vigorously denies, see pp. 4-5 & n.2, *supra*, but that strongly confirms that petitioner is attacking his Iraqi conviction and sentence.

Any doubt that petitioner is trying to use this habeas action to evade the jurisdiction of the Iraqi courts and to prevent his sentence from being carried out is eliminated by the relief he seeks, including an injunction bar-

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[6] Respondents agree with petitioner (Pet. 19) that the jurisdiction of the United States courts under *Hirota* does not depend on whether an individual has been convicted by a foreign tribunal. See Pet. at 13-16, *Omar*, *supra* (No. 07-394). As explained in the text, however, petitioner's conviction by the Iraqi court nevertheless provides further support for the conclusion that his claims are non-justiciable.

ring respondents from transferring petitioner to Iraqi custody and instead requiring respondents to transport petitioner to the United States. See C.A. App. 18-19; see also *Holmes* v. *Laird*, 459 F.2d 1211, 1225 (D.C. Cir.) (holding that it would be "beyond the purview of this Court" to enjoin the Executive's surrender to German custody of United States servicemen who had been convicted by a German court before fleeing to the United States), cert. denied, 409 U.S. 869 (1972).[7]

c. Petitioner incorrectly asserts (Pet. 9) that, in the lower courts, "neither party had briefed" the concerns that Judge Randolph identified in his separate opinion, which found that there was jurisdiction but nevertheless concluded that this action must be dismissed. To the contrary, the government devoted 22 pages of its court of appeals brief to its political-question and international-comity arguments, and petitioner likewise briefed the justiciability of his claims in that court. See Gov't C.A. Br. 34-56; *id.* at 44 n.7 (specifically relying on *Wilson*, the case Judge Randolph found conclusive); Pet. C.A. Reply 22-25. The government is entitled to defend the court of appeals' judgment on alternative grounds, especially considering that Judge Randolph himself relied on those grounds. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 166 (1997). And here, the jurisdictional and justiciability concerns are interrelated because, as the court of ap-

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[7] Petitioner asserts (Pet. 22) that, in addition to challenging the Iraqi proceedings and his potential transfer within Iraq to Iraqi custody, he also challenges his custody by United States forces acting as part of the MNF-I. But petitioner's challenge to his MNF-I custody would be mooted by his transfer to Iraqi custody (which he seeks to block). Thus, this action boils down to an attempt by petitioner to evade the jurisdiction of the Iraqi courts and to prevent his conviction from being given effect.

peals recognized, the political-question and international-comity problems would directly stem from the United States' courts' assertion of jurisdiction over actions of a multinational force operating under international authority in a foreign war zone. See Pet. App. 4-5 ("[C]onducting habeas proceedings in the face of [a foreign] conviction risks judicial second-guessing of a non-U.S. court's judgments and sentences.").

Justice Jackson noted that very fact in *Hirota*:

> For this Court now to call up these cases for judicial review under exclusively American law can only be regarded as a warning to our associates in the trials that no commitment of the President or of the military authorities, even in matters such as these, has finality or validity under our form of government until it has the approval of this Court. And since the Court's approval or disapproval cannot be known until after the event—usually long after—it would substantially handicap our country in asking other nations to rely upon the word or act of the President in affairs which only he is competent to conduct.

Hirota v. *MacArthur*, 335 U.S. 876, 878 (1948).

3. As noted, the government's petition for a writ of certiorari in *Omar*, *supra*, presents the same threshold jurisdictional question presented in this case. In *Omar*, a dual United States-Jordanian citizen who voluntarily traveled to Iraq, allegedly committed serious crimes there, and was captured in an active combat zone by the MNF-I is challenging his detention by United States troops acting as part of the MNF-I, as well as his potential transfer to Iraqi custody or trial by the CCCI. *Omar* v. *Harvey*, 479 F.3d 1, 3 (D.C. Cir. 2007), petition for cert. pending, No. 07-394 (filed Sept. 21, 2007). The

District of Columbia Circuit held that the United States courts have jurisdiction over Omar's habeas petition and that his claims are justiciable. *Id.* at 9, 10-11. That court also upheld an injunction against Omar's transfer to Iraqi custody or presentation to the CCCI for investigation and prosecution. *Id.* at 11-12, 14.

Because the District of Columbia Circuit upheld the district court's injunction as well as its assertion of jurisdiction in *Omar*, that case provides a better vehicle than this case for considering the full set of issues concerning the authority of the United States courts to entertain habeas petitions filed on behalf of individuals detained by a multinational force abroad acting under international authority. In addition, this case, unlike *Omar*, involves a dual Iraqi-United States citizen who has already been convicted by the Iraqi courts for violating Iraqi law. As discussed, that unusual fact pattern makes the justiciability concerns even stronger in this case than in others, which makes it a less ideal vehicle for considering questions of more general applicability.

Accordingly, the Court should hold the petition for a writ of certiorari in this case and dispose of it as appropriate in light of its disposition of *Omar*. Alternatively, this Court could grant both petitions and consolidate the cases for oral argument.

CONCLUSION

The petition for a writ of certiorari should be held pending *Geren* v. *Omar*, No. 07-394, and disposed of as appropriate in light of this Court's disposition of *Omar*.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DOUGLAS N. LETTER
JONATHAN H. LEVY
LEWIS S. YELIN
Attorneys

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REPLY BRIEF

JONATHAN HAFETZ
AZIZ Z. HUQ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas
12th Floor
New York, NY 10013
Telephone: (212) 998-6730

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL, LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

JOSEPH MARGULIES
Counsel of Record
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713

VINCENT MOCCIO
AMY MAGID
ROBINS, KAPLAN, MILLER & CIRESI
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioners

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OR CALL COLLECT (402) 342-2831

REPLY BRIEF

Retreating from its position below, the government now agrees with Mr. Munaf that the power of a U.S. court to inquire into the lawfulness of his detention cannot depend on the happenstance of a foreign conviction. *Cf.* Pet. for Cert. at 14-16, *Geren v. Omar* (No. 07-394). The parties therefore agree that the process which took place before the Iraqi courts, whatever relevance it may have to the merits, "has nothing to do with the existence of jurisdiction." *Id.* at 13-14.

The parties also agree that the threshold *jurisdictional* question is the same in *Munaf* and *Omar*.[1] The government, however, believes *Omar* presents a "superior vehicle" for resolution of this shared issue, and therefore urges the Court to grant *Omar* and hold *Munaf*. Alternatively, it asks the Court to grant

---

[1] The government is incorrect to state that it argued the merits questions that Judge Randolph reached in his separate opinion. *See* Br. for Resp'ts at 17. Judge Randolph concluded the "the district court had jurisdiction over Munaf's habeas corpus petition." *Munaf v. Geren*, 482 F.3d 582, 585 (D.C. Cir. 2007) (Randolph, J., concurring). Hence, he rejected the "jurisdictional and justiciability concerns" that the government raised in its brief. Br. for Resp'ts at 17; *see also* Br. for Appellees at 11-16, *Munaf v. Geren*, 482 F.3d 582, 585 (D.C. Cir. 2007) (No. 06-1455) (framing issue solely in terms of jurisdiction and justiciability, and not the merits question of whether the government has the power to detain or transfer Mr. Munaf). Thus, as in *Omar*, the government has improperly attempted to import a merits question into a jurisdictional appeal – despite the fact that the parties did not brief, and the lower court did not address, the merits.

and consolidate both cases. *Id.* at 26; *see also* Br. for Resp'ts at 19-20. Here, the parties part company.

As demonstrated at length in Mr. Omar's response to the government's petition for certiorari, the government's reading of *Hirota v. MacArthur* is plainly incorrect: the government simply lacks the power to seize and hold its citizens without judicial oversight, and nothing in *Hirota* is to the contrary. *See generally* Br. for the Resp'ts, *Geren v. Omar* (dkt no. 07-394). For that reason, the government's petition in *Omar* should be denied. The proper resolution of *Munaf* follows logically from that result: The Court should grant the petition in *Munaf*, vacate the decision below in light of the position now asserted by the government, and remand for proceedings on the merits of Mr. Munaf's petition for a writ of habeas corpus. If, however, the Court grants the petition in *Omar*, then Mr. Munaf agrees with the government that his petition should be held pending the outcome in that case.[2]

---

[2] The government identifies Mr. Munaf as a dual-citizen, as though it were somehow significant that he was not born in this country. *See, e.g.*, Br. for Resp'ts at 15. "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency," *Luria v. United States*, 231 U.S. 9, 13 (1913), and the Supreme Court has long understood the importance to the country of a rigorous insistence on this principle. *See, e.g., Baumgartner v. United States*, 322 U.S. 665 (1944).

Respectfully submitted,

JOSEPH MARGULIES*
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890
Facsimile: (312) 503-1272

AZIZ Z. HUQ
JONATHAN HAFETZ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (212) 998-6730
Facsimile: (212) 995-4550

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590
Facsimile: (215) 482-0874

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713
Facsimile: (212) 665-2714

VINCENT MOCCIO
AMY MAGID
ROBINS, KAPLAN, MILLER & CIRESI
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for Petitioner

**Counsel of Record*
Dated: November 2007

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Nos. 06-1666 and 07-394

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In the Supreme Court of the United States

MOHAMMAD MUNAF, ET AL., PETITIONERS

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT OF FRIENDS OF SHAWQI AHMAD OMAR

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOINT APPENDIX

PAUL D. CLEMENT
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

Counsel of Record for the Federal Parties

JOSEPH MARGULIES
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
(312) 503-0890

Counsel of Record for Habeas Petitioners

PETITIONS FOR A WRIT OF CERTIORARI FILED:
JUNE 13, 2007, AND SEPTEMBER 21, 2007
CERTIORARI GRANTED: DEC. 7, 2007

TABLE OF CONTENTS

Page

Mohammad Munaf:

Court of appeals docket entries 1
District court docket entries 14
Petition for writ of habeas corpus (Aug. 15, 2006) 27
Declaration of John D. Gardner (Sept. 15, 2006) 42
Declaration of Sean Riordan (Sept. 20, 2006) 50
Supplemental declaration of Sean Riordan (Oct. 12, 2006) 53
Second supplemental declaration of Sean Riordan (Oct. 16, 2006) 57
Declaration of Robert M. Pirone (Oct. 16, 2006) 60
Order (Oct. 19, 2006) 66
Martina Constantinoiu, *Who is Lying: In Munaf's Case*? (Oct. 21, 2006) 67
Romania Ministry of Justice Press Release (Nov. 2, 2006) 72

Sandra K. Omar:

Court of appeals docket entries 78
District court docket entries 88
Petition for writ of habeas corpus (Dec. 2, 2005) 104
Order (filed Feb. 3, 2006) 125
Declaration of Susan L. Burke (Feb. 5, 2006) and exhibits 128
Declaration of Curt Goering (Feb. 5, 2006) 150
Declaration of Hania Mufti (Feb. 6, 2006) 153
Memorandum opinion (Feb. 6, 2006) 155

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 06-5324

MUNAF, MOHAMMAD, ET AL., APPELLANTS

v.

HARVEY, FRANCIS, ET AL., APPELLEES

DOCKET ENTRIES

DATE	PROCEEDINGS
10/20/06	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Mohammad Muhaf, Appellant Maisoon Mohammed. [999099-1] (mam) [06-5324]
10/20/06	MOTION filed (5 copies) by Appellants Mohammad Muhaf and Maisoon Mohammed (certificate of service by mail dated 10/20/06) for injunction pending appeal [999233-1], containing a request to have the panel who heard oral argument in case No. 06-5126 hear this case. Response due on 11/6/06. (mam) [06-5324]
10/23/06	SUPPLEMENT (signed original of motion) to [999451-1] motion injunction [999233-1] filed by Appellant Mohammad Muhaf. (mam) [06-5324]

DATE	PROCEEDINGS
10/23/06	PER CURIAM ORDER filed [999547] denying request to assn appeal to panel who heard oral argument in 06-5126 (Judge Tatel, Judge Brown and Judge Edwards) and referring consideration of motion injunction [999233-1] to a special panel. [Entry Date: 10/23/06] [06-5126, 06-5324] (mam) [06-5126 06-5324]
10/23/06	PER CURIAM ORDER filed [999558] directing parties to file the following regarding the motion injunction [999233-1]: appellees' response, due on 10/25/06, by 12:00 noon; appellant's reply due on 10/26/06 by 12:00 noon. Papers to be hand-filed and hand-delivered. [Entry Date: 10/23/06] (mam) [06-5324]
10/25/06	OPPOSITION filed [1000891-1] (5 copies) by Appellees Francis J. Harvey et al. (certificate of service by hand and mail dated 10/25/06) to a motion injunction [999233-1]. (mam) [06-5324]
10/26/06	REPLY filed [1000893-1] (5 copies) by Appellant Mohammad Munaf (certificate of service by mail dated 10/26/06) to a response to the motion injunction [999233-1]. (mam) [06-5324]

DATE	PROCEEDINGS
10/27/06	PER CURIAM ORDER filed [1001091] denying motion for injunctive relief [999233-1] filed by Mohammad Munaf, Maisoon Mohammed; Appellants have not satisifed the stringent standards required for an injunction pending appeal; FURTHER ORDERED, on the court's own motion, enjoining appellees from transferring appellant Mohammad Munaf to Iraqi custody before 4:30 p.m., EST, on 11/6/06, or until such time as the Supreme Court acts upon an application for stay or for other relief, whichever occurs last; The purpose of this decretal paragraph is to give appellants an opportunity to seek relief from the Supreme Court; If no relief is sought by 4:30 p.m. EST, on 11/6/06, then this injunction will be lifted; Counsel for appellants is directed to notify the Clerk of the court if an application is filed in the Supreme Court and the disposition of an such application. Before Judges Sentelle, Henderson, Tatel*. (*Circuit Judge Tatel would grant the motion for injunctive relief for the reasons set for in an attached dissenting statement) (Entry Date: 10/27/06] (cwc) [06-5324]

DATE	PROCEEDINGS
10/30/06	FIRST CLASS MAIL [1008440-1] sent to Mr. Hafetz RETURNED marked return to sender. Mail was two orders filed 10/23/06. (mam) [06-5324]
11/06/06	CLERK'S ORDER filed [1002718] directing Appellant to file [1002718-1]: docketing statement due 12/6/06 for Mohammad Munaf; certificate of counsel due 12/6/06 for Mohammad Munaf; statement of issues due 12/6/06 for Mohammad Munaf; lower court decision due 12/6/06 for Mohammad Munaf; any procedural motions due 12/6/06 for Mohammad Munaf; transcript status notice due 12/6/06 for Mohammad Munaf; deferred appendix notice due 12/6/06 for Mohammad Munaf; appearance form due 12/6/06 for Jonathan Lewis Hafetz, for Susan L. Burke; any dispositive motions due 12/21/06 for Mohammad Munaf;, directing Appellee to file [1002718-2]: certificate of counsel due 12/6/06 for Francis J. Harvey; any procedural motions due 12/6/06 for Francis J. Harvey; appearance form due 12/6/06 for Douglas N. Letter; any dispositive motions due 12/21/06 for Francis J. Harvey;. [Entry Date: 11/6/06] (smc) [06-5324]

DATE	PROCEEDINGS
11/6/06	MOTION filed (5 copies) by Appellant Mohammad Munaf, Appellant Maisoon Mohammed (certificate of service dated 11/6/06) for en banc reconsideration [1002929-1] of the court's order denying the injunctive relief. (mcm) [06-5324]
11/7/06	CLERK'S ORDER filed [1003132] that appellees filed by noon on November 13, 2006, a response to the petition, nte 15 pages. Absent further order of the court, the court will not accept a reply to the response. [1002929-1] [Entry Date: 11/7/06] (lej) [06-5324]
11/10//06	PER CURIAM ORDER filed [1003792], on the court's own motion, that the injunction entered October 27, 2006, be extended until such time as the court disposes of the petition for reconsideration en banc. Before Judges Sentelle, Henderson, Tatel. [Entry Date: 11/12/06] (mcm) [06-5324]
11/13/06	OPPOSITION filed [1004961-1] (5 copies) by Appellee Francis J. Harvey, Appellee William H. Brandenburg, Appellee Steele (certificate of service dated 11/13/06) to a motion reconsideration [1002929-1]. (mcm) [06-5324]

DATE	PROCEEDINGS
11/13/06	NOTICE filed by the Supreme Court advising that an application for temporary injunctive relief was presented to the Chief Justice and was denied. [1008888-1] (lej) [06-5324]
11/14/06	LETTER sent on 11/13/06 by Attorney for Appellant Mohammad Munaf with courtesy copy of Petitioner-Appellants Reply Memorandum in Support of Application for Temporary Injunctive Relief filed with the US Supreme Court on 11/10/06. [1004653-1] (hts) [06-5324]
11/16/06	MOTION filed (5 copies) by Appellant Mohammad Munaf, Appellant Maisoon Mohammed (certificate of mail service dated 11/16/06) to expedite case [1006131-1] Response due on 12/4/06. (lej) [06-5324]
12/1/06	PER CURIAM ORDER filed [1008124] granting motion expedite case and establishing briefing schedule [1008124-1] and format: Appellant's brief, 14,000 wds, due on 12/8/06; appendix due on 12/8/06; Appellee's brief, 14,000 wds, due on 12/22/06; Appellant's reply brief, 7,000 wds, due on 1/5/07. Parties directed to hand-file and hand-serve submissions; Clerk directed to calendar

DATE	PROCEEDINGS
	case for oral argument on the first available date following completion of briefing. Before Judges Randolph, Garland, Brown. [Entry Date: 12/1/06] (mam) [06-5324]
12/5/06	FIRST CLASS MAIL [1008909-1] RESENT. Reason mail resent: address for Mr. Hafetz is correct. Mail was 10/23/06 orders (mam) [06-5324]
12/6/06	ENTRY OF APPEARANCE filed by Attorneys Lewis Yelin and Douglas N. Letter for Appellees Steele, William H. Brandenburg, and Francis J. Harvey [1011204-1]. (krm) [06-5324]
12/6/06	INITIAL SUBMISSIONS filed by Appellant Mohammad Munaf, Appellant Maisoon Mohammed [1012307-1]. Docketing Statement. (lvs) [06-5324]
12/6/06	ENTRY OF APPEARANCE filed by Attorney Joe Margulies for Appellant Maisoon Mohammed, Appellant Mohammad Munaf, Jonathan Lewis Hafetz for Appellant Maisoon Mohammed, Appellant Mohammad Munaf, Susan L. Burke for Appellant Maisoon Mohammed, Appellant Mohammad Munaf [1014576-1]. (smc) [06-5324]

DATE	PROCEEDINGS
12/6/06	NOTICE filed by Appellant Mohammad Munaf INTERIM transcript status notice filed [1014577-1]. Certificate of service date 12/6/06. (smc) [06-5324]
12/6/06	INITIAL SUBMISSIONS filed by Appellant Mohammad Munaf [1014578-1]: statement of issues, deferred appendix notice, lower court decision. (smc) [06-5324]
12/8/06	BRIEF filed by Appellant Mohammad Munaf [1010204-1]. Copies: 15. Certificate of service date 12/8/06. (smc) [06-5324]
12/8/06	APPENDIX filed by Appellant Mohammad Munaf [1010215-1]. Copies: 10. Certificate of service date 12/8/06. (smc) [06-5324]
12/12/06	ERRATA SHEET to brief [1010204-1] filed by Appellant Mohammad Munaf. (smc) [06-5324]
12/12/06	FIRST CLASS MAIL (sent to Mr. Hafetz, Esq.) [1011954-1] RETURNED marked not delivered as addressed unable to forward. Mail was in response to two orders filed on 10/23/06. (krm) [06-5324]

DATE	PROCEEDINGS
12/14/06	INITIAL SUBMISSIONS filed by Appellees Francis J. Harvey, William H. Brandenburg, and Steele [1011208-1]: certificate of counsel. (krm) [06-5324]
12/15/06	PER CURIAM ORDER, In Banc, filed [1011269] granting motion reconsideration. Appellees are hereby enjoined from transferring Appellant Mohammad Mnuaf [*sic*] to Iraqi custody pending resolution of this appeal. [1002929-1]. Before Judges Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith,. [Entry Date: 12/15/06] (lej) [06-5324]
12/22/06	BRIEF filed by Appellee Francis J. Harvey, Appellee William H. Brandenburg, Appellee Steele [1014029-1]. Copies: 15. Certificate of service date 12/22/06. (lmf) [06-5324]
1/5/07	REPLY BRIEF filed by Appellants Mohammad Munaf and Maisoon Mohammed [1015081-1]. Copies: 15. Certificate of mail and electronic mail service date 1/5/07. (krm) [06-5324]
1/12/07	CLERK'S ORDER filed [1016155] to schedule oral argument [1016155-1] before Judge Initials: DBS ARR BMK on 2/16/07 at 9:30 AM. [Entry Date: 1/12/07] (cwc) [06-5324]

DATE	PROCEEDINGS
1/17/07	FORM 72 filed by Attorney Joe Margulies on behalf of appellants Mohammad Munuf [*sic*] [1022905-1] [1022905-2]. (set) [06-5324]
1/23/07	NOTICE filed by Appellant Mohammad Munaf FINAL transcript status notice filed [1019589-1]. Transcripts completed . . Certificate of service date 1/23/07. (smc) [06-5324]
1/29/07	LETTER filed by Appellee Francis J. Harvey, Appellee William H. Brandenburg, Appellee Steele pursuant to FRAP 28j advising of additional authorities [1019783-1]. Certificate of service date 1/29/07. (lej) [06-5324]
2/7/07	PER CURIAM ORDER filed [1021584] to allocate oral argument times: APET minutes- 20 ERES minutes- 20. [1021584-1], Form 72 notice of attorney arguing case - [1021584-2] due 2/13/07. [Entry Date: 2/7/07] (cwc) [06-5324]
2/8/06	FORM 72 filed by Attorney Gregory George Garre on behalf of appellees Francis J. Harvey, et al. [1022907-1] [1022907-2]. (set) [06-5324]

DATE	PROCEEDINGS
2/13/07	LETTER filed by Appellees pursuant to FRAP 28j advising of additional authorities [1022867-1]. Certificate of service date 2/12/07. (lej) [06-5324]
2/14/07	LETTER filed by Appellant Mohammad Munaf, Appellant Maisoon Mohammed pursuant to FRAP 28j advising of additional authorities [1023055-1]. Certificate of service date 2/12/07. (cwc) [06-5324]
2/16/07	ORAL ARGUMENT HELD before Sentelle, Randolph, Kavanaugh. (set) [06-5324]
4/6/07	JUDGMENT for the reasons in the accompanying opinion affirming [1033348-1] the decision of the district court. Before Judges Sentelle, Randolph, Kavanaugh. [Entry Date: 4/6/07] (mam) [06-5324]
4/6/07	OPINION filed [1033349] (6 pgs) for the Court filed by Judge Sentelle, CONCURRING OPINION (3 pgs) filed by Judge Randolph (mam) [06-5324]

DATE	PROCEEDINGS
4/6/07	CLERK'S ORDER filed [1033350] directing Clerk to withhold issuance of the mandate [1033350-1] pending disposition of any timely petition for rehearing. . [Entry Date: 4/6/07] (mam) [06-5324]
4/12/07	FIRST CLASS MAIL [1035830-1] sent to Jonathan Hafetz, Esq. RETURNED marked moved, not forwarded. Mail was in response to a clerk order withholding mandate [1033350-1]. (krm) [06-5324]
4/27/07	MOTION filed (5 copies) by Appellant Mohammad Munaf (certificate of service by mail dated 4/27/07) to stay issuance of the mandate. (mam) [06-5324]
5/3/07	OPPOSITION filed [1039143-1] (5 copies) by Appellees Pete Geren, et al. (certificate of mail service dated 5/3/07) to Appellants' motion stay mandate pending disposition of petition for writ of certiorari [1037344-1]. (smc) [06-5324]
5/9/07	PER CURIAM ORDER filed [1039571] granting motion stay the mandate filed by Mohammad Munaf [1037344-1]. Before Judges Sentelle, Randolph, Kavanaugh. [Entry Date: 5/9/07] (mcm) [06-5324]

DATE	PROCEEDINGS
5/9/07	REPLY filed [1039706-1] (5 copies) by Appellants Mohammad Munaf and Maisoon Mohammed (certificate of mail service dated 5/8/07) to Appellees' Opposition to motion to stay the mandate pending disposition of a petition for writ of certiorari. (smc) [06-5324]
6/18/07	LETTER dated 6/15/07 received from the S. Ct. advising that the petition for a writ of certiorari was filed on 6/13/07 and docked on 6/15/07 as No. 06-1666 [1048880-1]. (krm) [06-5324]
6/18/07	LETTER filed by Counsel for Appellant Mohammad Munaf notifying this court that a petition for writ of certiorari has been filed at the United States Supreme Court [1049417-1]. (mcm) [06-5324]
12/10/07	LETTER sent by S. Ct. entering an order granting petition for writ of certiorari. [1086026-1] The case is consolidated with 07-394 and a total of one hour is allotted for oral argument. (hts) [06-5324]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 06-5324

MAISOON MOHAMMAD, NEXT FRIEND OF
MOHAMMAD MUNAF, PETITIONERS-APPELLANTS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
08/18/2006	1	PETITION for Writ of Habeas Corpus (Filing fee $5.) filed by MOHAMMAD MUNAF and MAISOON MOHAMMED. (tg,) Modified on 8/24/2006 (lc,). (Entered: 08/21/2006
09/01/2006	2	MOTION for Leave to Appear Pro Hac Vice: Attorney Name-Jonathan Hafetz: Address- Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas,

DATE	DOCKET NUMBER	PROCEEDINGS
		12th Floor, New York, NY 10013. Phone No. - (212) 998-6730. Fax No. - (212) 995-4550 by MOHAMMAD MUNAF, MAISOON MOHAMMED. (Burke, Susan) (Entered: 09/01/2006)
09/01/2006	3	MOTION for Leave to Appear Pro Hac Vice: Attorney Name-Aziz Huq.: Address- Brennan Center for Justice at NYU School of Law, 161 Avenue of the Americas, 12th Floor, New York, NY 10013. Phone No. - (212) 992-8632. Fax No. - (212) 995-4550 by MOHAMMAD MUNAF, MAISOON MOHAMMED. (Burke, Susan) (Entered: 09/01/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
09/05/2006	4	ORDER granting 2 Motion to allow Jonathan Hafetz, Esquire admittance to the bar of this Court pro hac vice as counsel for Maisson Mohammed et al. in this case. Signed by Judge Royce C. Lamberth on 9/5/06. (lcrcl2,) (Entered: 09/05/2006)
09/05/2006	5	ORDER granting 3 Motion to allow Aziz Huq, Esquire admittance to the bar of this Court pro hac vice as counsel for Maisson Mohammed et al. in this case. Signed by Judge Royce C. Lamberth on 9/5/06. (lcrcl2,) (Entered: 09/05/2006)
09/08/2006	6	MOTION for Temporary Restraining Order *Preventing Petitioner Munaf's Transfer to Iraqi Authorities* by MOHAMMAD MUNAF, MAISOON MOHAMMED

DATE	DOCKET NUMBER	PROCEEDINGS
		(Attachments: # 1 Text of Proposed Order # 2 Text of Proposed Order) (Hafetz, Jonathan) # 3 Memorandum of Points and Authorities # 4 Exhibits. Additional attachment(s) added on 9/11/2006 (tg,). Modified on 9/11/2006 (tg,). (Entered: 09/08/2006)
09/08/2006	7	ENTERED IN ERROR .....MOTION for Temporary Restraining Order *Memorandum of Law in Support of Temporary Restraining Order* by MOHAMMAD MUNAF, MAISOON MOHAMMED. (Attachments: # 1 Exhibit Exhibits to Memorandum of Law in Support of Temproary [*sic*] Restraining Order) (Hafetz, Jonathan) Modified on 9/11/2006 (tg,). (Entered: 09/08/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
09/11/2006		NOTICE OF CORRECTED DOCKET ENTRY: re 7 MOTION for Temporary Restraining Order *Memorandum of Law in Support of Temporary Restraining Order* was entered in error as counsel used the wrong ECF event to docket attachment to a motion. The clerk properly attached the documents to the related motion. (tg,) (Entered: 09/11/2006)
09/12/2006	8	ORDER that the Respondents' opposition to the Motion for Temporary Restraining Order be filed on or before September 15, 2006, and that Petitioners' reply be filed on or before September 20, 2006. Signed by Judge Royce C. Lamberth on 9/12/2006. (lcrcl 1,) (Entered: 09/12/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
09/13/2006		Set/Reset Deadlines: Respondents' Responses due by 9/15/2006. Petitioners' Replies due by 9/20/2006. (rje) (Entered: 09/13/2006)
09/16/2006	9	Memorandum in opposition to re 6 MOTION for Temporary Restraining Order *Preventing Petitioner Munaf's Transfer to Iraqi Authorities* filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, STEELE. (Attachments: # 1 Exhibit 1# 2 Exhibit 2# 3 Exhibit 3# 4 Exhibit 4# 5 Exhibit 5) (White, Edward) (Entered: 09/16/2006)
09/20/2006	10	REPLY to opposition to motion re 6 MOTION for Temporary Restraining Order *Preventing Petitioner Munaf's Transfer to Iraqi Authorities* filed by MOHAMMAD

DATE	DOCKET NUMBER	PROCEEDINGS
		MUNAF, MAISOON MOHAMMED. (Attachments: # 1 Exhibit Declaration of Sean Riordan) (Hafetz, Jonathan) (Entered: 09/20/2006)
09/28/2006	11	ORDER Setting Hearing on Motion 6 MOTION for Temporary Restraining Order *Preventing Petitioner Munaf's Transfer to Iraqi Authorities:* Motion Hearing set for 10/2/2006 10:00 AM in Courtroom 22A before Judge Royce C. Lamberth. Signed by Judge Royce C. Lamberth on 9/28/2006. (lcrcl 1,) (Entered: 09/28/2006)
09/29/2006		Set/Reset Hearings: Motion Hearing set for 10/2/2006 at 10:00 AM in Courtroom 22A before Judge Royce C. Lamberth. (rje) (Entered: 09/29/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
09/29/2006		Set/Reset Hearings: Motion Hearing reset for 10/10/2006 at 09:30 AM in Courtroom 22A before Judge Royce C. Lamberth (rje) (Entered: 09/29/2006)
10/10/2006		Minute Entry for proceedings held before Judge Royce C. Lamberth: Motion Hearing held on 10/10/2006 re 6 MOTION for Temporary Restraining Order *Preventing Petitioner Munaf's Transfer to Iraqi Authorities* filed by MAISOON MOHAMMED,, MOHAMMAD MUNAF, heard and held in abeyance. (Court Reporter Theresa Sorensen.) (rje) (Entered: 10/10/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/13/2006	12	Supplemental MOTION for Temporary Restraining Order *Preventing Petitioner's Motion to Iraqi Authorities* by MOHAMMAD MUNAF, MAISOON MOHAMMED. (Attachments: # 1 Exhibit Supplemental Declaration of Sean Riordan # 2 Text of Proposed Order Proposed Order) (Hafetz, Jonathan) (Entered: 10/13/ 2006)
10/16/2006	13	RESPONSE to 12 *Petitioners' Emergency Supplement* filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, STEELE. (Attachments: # 1 Exhibit 1) (White, Edward) Modified on 10/17/2006 (tg,). (Entered: 10/16/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/17/2006	14	ENTERED IN ERROR.....Supplemental MOTION for Temporary Restraining Order *Preventing Petitioner's Transfer to Iraqi Custody* by MOHAMMAD MUNAF, MAISOON MOHAMMED. (Attachments: # 1) (Hafetz, Jonathan) Modified on 10/18/2006 (tg,). (Entered: 10/17/2006)
10/17/2006	15	REPLY to Response to 12 Supplemental MOTION for Temporary Restraining Order *Preventing Petitioner's Motion to Iraqi Authorities* filed by MOHAMMAD MUNAF, MAISOON MOHAMMED. (Attachments: # 1 Exhibit A) (tg,) (Entered: 10/18/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/18/2007		NOTICE OF CORRECTED DOCKET ENTRY: re 14 Supplemental MOTION for Temporary Restraining Order *Preventing Petitioner's Transfer to Iraqi Custody* was entered in error as the filer used the wrong ECF event to docket a Reply. The clerk refiled the document under docket number 15. (tg,) (Entered: 10/18/2006)
10/19/2006	16	ORDER dismissing 1 Petition for Writ of Habeas Corpus for lack of subject matter jurisdiction, denying 6 Motion for TRO, denying 12 Motion for TRO. Signed by Judge Royce C. Lamberth on 10/19/2006. (lcrcl 1,) (Entered: 10/19/ 2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/19/2006	17	MEMORANDUM AND OPINION. Signed by Judge Royce C. Lamberth on 10/19/2006. (lcrcl 1,) (Entered: 10/19/ 2006)
10/19/2006	18	NOTICE OF APPEAL as to 17 Memorandum & Opinion, 16 Order on Motion for TRO, by MOHAMMAD MUNAF, MAISOON MOHAMMED. Filing fee $455, receipt number 1032671. Fee Status: Fee Paid. Parties have been notified. (Burke, Susan) (Entered: 10/19/2006)
10/19/2006		Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals re 18 Notice of Appeal (tg,) (Entered: 10/20/ 2006)

DATE	DOCKET NUMBER	PROCEEDINGS
10/24/2006		USCA Case Number 06-5324 for 18 Notice of Appeal filed by MAISOON MOHAMMED, MOHAMMAD MUNAF. (tg,) (Entered: 10/25/2006)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. [Omitted]

MAISOON MOHAMMED AS NEXT FRIEND OF
MOHAMMAD MUNAF, CAMP BUCCA, IRAQ;
PETITIONERS

v.

FRANCIS J. HARVEY,
SECRETARY OF THE U.S. ARMY
101 ARMY PENTAGON ROOM 3E-506
WASHINGTON, D.C. 20301-0101

MAJOR GENERAL
WILLIAM H. BRANDENBURG,
DEPUTY COMMANDING GENERAL
(DETAINEE OPERATIONS)/COMMANDING GENERAL,
TASK FORCE 134, MULTI-NATIONAL FORCE-IRAQ

COLONEL [FNU] STEELE,
COMMANDING OFFICER,
CAMP CROPPER, IRAQ; RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

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1. Petitioner Mohammad Munaf seeks a writ of habeas corpus. Petitioner is an American citizen imprisoned by the U.S. military for more than one year at Camp Cropper Prison at Baghdad International Airport in Iraq. He has been detained almost *incommunicado*, without any access to U.S. counsel, without due process,

and under threat of transfer to Iraqi authorities. He continues to be severely restricted in his contacts with his family and the outside world.

2. On information and belief, Mr. Munaf traveled to Iraq at the behest of and with three journalists from Romania in March 2005 as a translator and guide. Soon after their arrival, unknown persons kidnapped Mr. Munaf and the three Romanian journalists, and held them captive for fifty-five days.

3. Upon his release from captivity, Mr. Munaf was imprisoned by the U.S. military at a prison compound located at the Baghdad International Airport ("BIAP"). Mr. Munaf has remained in U.S. custody at Camp Cropper Prison at BIAP since approximately June 2005. Mr. Munaf's detainee number is [REDACTED].

4. For the first five months of his detention, Mr. Munaf was not allowed contact with his family or a lawyer. Since approximately November 2005, he has been offered very limited contact with his family. He has had limited access to an Iraqi attorney. Despite his requests, he has been denied access to an American attorney.

5. The U.S. Constitution, the laws of the U.S., and the binding obligations of international law prohibit the U.S. government from arresting its citizens and detaining them without charge or lawful process, all without permitting them access to counsel. Mr. Munaf's prolonged detention, which has by now lasted more than one year, violates constitutional, statutory, and international laws, including:

a. The fundamental right to due process of law guaranteed by the Fifth Amendment to the U.S. Constitution;

b. The fundamental right to be free from governmental restraint absent a criminal proceeding or judicial process under the Suspension Clause of the U.S. Constitution;

c. The fundamental right to assistance of counsel guaranteed by the Fifth Amendment to the U.S. Constitution;

d. The right to be free from arbitrary and indefinite executive detention pursuant to the Citizen Non-Detention Act, 18 U.S.C. § 4001(a);

e. The right as a noncombatant to be free from arbitrary and indefinite detention as guaranteed by the International Covenant on Civil and Political Rights and understood by customary international law, including the customary international law of armed conflict; and

f. The right to be free from an unlawful transfer to a foreign sovereign to be tortured and denied due process, as guaranteed by the Fifth Amendment to the U.S. Constitution, the habeas statute, and Common Article 3 of the Geneva Conventions.

6. Accordingly, Petitioners respectfully seek relief from this Court, inter alia, in the form of a writ of habeas corpus. Petitioners specifically request that this Court issue such a writ compelling Respondents to (1) permit Mr. Munaf immediate access to his attorneys of choice who are listed below, and not solely Iraqi counsel;

(2) establish a lawful basis for Mr. Munaf's detention or release him from custody; and (3) enjoin Mr. Munaf's transfer to Iraqi authorities.

JURISDICTION AND VENUE

7. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1) & (c)(3); 2242, and 2243. In addition, this Court has jurisdiction under the U.S. Constitution, Article I, § 9, cl. 2, Article III, and the Due Process Clause of the Fifth Amendment because those provisions guarantee Mr. Munaf a judicial forum in which to contest the legal validity of his detention. Mr. Munaf further invokes this Court's jurisdiction under 28 U.S.C. §§ 1331, 1651 (All Writs Act), 2201 & 2202 (Declaratory Judgment Act).

8. Mr. Munaf is entitled to challenge his detention in federal court. A U.S. citizen detained in the custody of federal officials in violation of the Constitution, laws, or treaties of the U.S. unquestionably has the right to challenge that detention in federal court once personal jurisdiction over the petitioner's custodian is established.

9. Mr. Munaf is detained by U.S. officials at a detention facility known as Camp Cropper. The facility is under the control of the U.S. military and within the plenary and exclusive jurisdiction or dominion exercised in fact of the U.S..

10. This Court possesses personal jurisdiction over Respondents because they are officers or agents of the U.S., carry out their responsibilities in the District of Columbia, have substantial contacts in that District, and one or more of the Respondents are physically located within the territorial jurisdiction of the Court.

11. Venue is proper in the District of Columbia for this writ of habeas corpus because one or more of the Respondents resides within the jurisdiction of this Court and is amenable to service of process in the District. 28 U.S.C. §§ 1391(a), (b) & (e).

PARTIES

12. Petitioner Mohammad Munaf is a U.S. citizen. His passport number is [REDACTED]; it was issued February 2, 2000. *See* Ex. 1 (Mohammed Decl.) ¶ 7. He is currently incarcerated at Camp Cropper, and has been assigned detainee number 200175. *Id.* ¶ 16. Mr. Munaf has repeatedly requested that his captors provide him with U.S. counsel, but to date these requests have been denied.

13. Petitioner Maisoon Mohammed is Mr. Munaf's sister. Her declaration is attached as Exhibit 1. Ms. Mohammed is a U.S. citizen who resides in Michigan. Ex. 1 (Mohammed Decl.) ¶ 3. Ms. Mohammed has communicated with U.S. officials about her brother's imprisonment and is deeply concerned about Mr. Munaf's health and well being. *Id.* ¶¶ 14-15, 21. Because Mr. Munaf has been denied access to U.S. counsel and courts, Ms. Mohammed acts as his next friend. *Id.* ¶ 1.

14. Respondent Francis J. Harvey is Secretary of the U.S. Army. In that capacity, Respondent Harvey is the senior official of the Department of the Army. Respondent Harvey has authority over the custody and control of U.S. Armed Forces detainee operations in Iraq, including those held at Camp Cropper. As such, he is the custodian ultimately responsible for Mr. Munaf's detention. He is sued in his official capacity.

15. Respondent Major General William H. Brandenburg is Deputy Commanding General of Detainee Operations and Commanding General of Task Force 134, Multi-National Force-Iraq. Respondent Brandenburg has responsibility for detainee operations for the U.S. Armed Forces in Iraq. Respondent Brandenburg is charged with maintaining custody and control over all of the approximately 11,000 prisoners of the U.S. Army in Iraq, including those detained at Camp Cropper. He is sued in his official capacity.

16. Respondent Commander Colonel Steele is with the U.S. Army and is the commanding officer at Camp Cropper. His first name is unknown. Respondent Steele is Mr. Munaf's immediate custodian at Camp Cropper and has authority to release Mr. Munaf from U.S. custody.

STATEMENT OF FACTS

17. Mr. Munaf is a 53-year-old American-Iraqi citizen. Ex. 1 (Mohammed Decl.) ¶¶ 2, 4, 7. He was born in Baghdad, Iraq and emigrated to the U.S. in 1990. *Id.* ¶¶ 2, 6. He became a U.S. citizen in 2000. *Id.* ¶ 7.

18. In 1980, Mr. Munaf moved to Romania to start university studies. *Id.* ¶ 5. In 1989, Mr. Munaf married Georgette Victoria, a Romanian woman who later became an American citizen. *Id.* ¶ 6. They moved together to the U.S. in 1990 and lived in New York. *Id.* Between 1996 and 2001, Mr. Munaf and his family maintained residences in both Romania and the U.S. *Id.* ¶ 9. Since 2001, the family's residence has been solely in Romania. *Id.* Mr. Munaf and his wife have three children, all of whom are U.S. citizens who currently reside in Bucharest, Romania. *Id.* ¶ 8.

19. In March 2005, three Romanian journalists, Ovidiu Ohanesian, Marie Jeanne Ion, and Sorin Miscoci, invited Mr. Munaf to travel to Iraq with them as a guide and translator. The three Romanian journalists hired Mr. Munaf because of his ability to speak and read the Iraqi dialect of Arabic. They arrived in Baghdad on or around March 15, 2005. Mr. Munaf and the journalists subsequently traveled to an area southwest of Baghdad, Iraq. On or about March 28, 2005, unknown armed forces kidnapped them. *See* Ex. 1 (Mohammed Decl.) ¶ 11.

20. An Iraqi group identifying itself as the "Muadh Ibn Jabal Brigade" publicly claimed responsibility for the kidnapping. *Id.* ¶ 12. The group demanded that Romania withdraw its troops from Iraq and sought millions of dollars in ransom. *Id.* On or about May 22, 2005, after approximately fifty-five days of captivity, Mr. Munaf and the Romanian journalists were released. *Id.* ¶ 13, 14.

21. Upon their release, the journalists and Mr. Munaf were taken to the Romanian Embassy in Iraq. *Id.* ¶ 13. Mr. Munaf was transferred to U.S. custody that same day, immediately after the embassy visit. *Id.* ¶¶ 13-14. Mr. Munaf has remained in U.S. custody since that date.

22. Mr. Munaf is innocent. He has committed no crime or violent act against the U.S. or its allies, nor has he supported forces hostile to American interests. He has never been a member of or associated with al Qaeda or any other terrorist organization. He has never been a member of or associated with any insurgent group or militia. He is an innocent American citizen held unlawfully by his government in an Iraqi prison for more than

a year. The U.S. has told Petitioner Maisoon Mohammed that it does not have any evidence that Mr. Munaf violated any laws. *Id.* ¶ 15.

23. Petitioners have a real and immediate fear that the U.S. intends to transfer Mr. Munaf to Iraqi custody.

24. The transfer of Mr. Munaf to Iraqi custody would place him at grave risk of torture or death. There is evidence of systemic and widespread torture of prisoners in Iraqi custody, particularly Sunni Muslims such as Mr. Munaf. Furthermore, there is evidence that the Iraqi judicial system lacks even minimum standards of due process.

25. Upon information and belief, Mr. Munaf has been permitted to meet briefly with an Iraqi attorney, hired and paid for by his family in Iraq. *Id.* ¶ 18. Mr. Munaf's conversations with his Iraqi attorney are believed to be monitored by the U.S. military and are limited in duration. *Id.*

26. Mr. Munaf's family in Baghdad has been permitted to visit Mr. Munaf for thirty minutes approximately once per month for the last several months of his imprisonment. During a recent visit, on or about June 24, 2006, Mr. Munaf gave his family the name and phone number of Burke Pyle LLC, and asked his family to contact the firm on his behalf. *Id.* ¶ 20. Upon information and belief, Mr. Munaf has asked the U.S. military for permission to call the undersigned counsel, but his captors have denied this request. *Id.* ¶ 19.

27. Mr. Munaf is permitted to contact his wife and children in Romania by phone approximately once a month. *Id.* ¶ 21. These phone calls are monitored and limited in duration to approximately two to three minutes. *Id.*

28. In his conversations with his family, Mr. Munaf has maintained that he is innocent. *Id.* ¶ 22.

29. On or about April 9, 2006, U.S. military forces raided Mr. Munaf's parents' home in Baghdad, confiscating nearly $10,000 (USD) in cash, as well as jewelry, cameras, and other valuable items. In the course of the raid, significant damage was done to the house through the use of explosives. U.S. forces held a family member at gunpoint and forced her to open a safe which contained important family documents, including passports, all of which were seized. U.S. forces hooded Mr. Munaf's father, an 84-year-old man with dementia, and two of Mr. Munaf's nephews, ages 15 and 21. The U.S. forces arrested and imprisoned Mr. Munaf's nephews for several days without charge. When they were eventually released, the nephews were told by the U.S. military that their arrests had been a "mistake." Mr. Munaf's family suffered severe physical and psychological damage and continues to feel the effects of this attack. Upon information and belief, this attack was related to Mr. Munaf's unlawful arrest and imprisonment.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF UNLAWFUL DETENTION UNDER THE FIFTH AMENDMEN TO THE U.S. CONSTITUTION

30. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

31. Respondents' arbitrary and indefinite detention of Mr. Munaf without due process violates the "most elemental of liberty interests—the interest in being free from physical detention by one's own government" without due process of law. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality op.). The laws and Constitution of the U.S. protect Mr. Munaf, a U.S. citizen, at least as much as they protected Mr. Hamdi.

32. Respondents' detention of Mr. Munaf is arbitrary because the U.S. has neither charged Mr. Munaf with a crime nor provided a lawful basis for his continued detention. Detention of an American citizen without trial or any other lawful process, and the denial of access to counsel, violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution.

SECOND CLAIM FOR RELIEF UNLAWFUL DETENTION UNDER THE SUSPENSION CLAUSE

33. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

34. Respondents' detention of Mr. Munaf violates the Habeas Corpus Suspension Clause of the U.S. Constitution. Article I, § 9, cl. 2. The Suspension Clause

guarantees Mr. Munaf the right to be charged with a criminal offense or released.

35. The Suspension Clause guarantees Mr. Munaf the right to meaningful judicial process to ascertain the legal and factual bases of his detention. Mr. Munaf has not been given a meaningful opportunity to review or respond to the allegations against him and thus continues to be denied the judicial process that is required absent suspension of the writ of habeas corpus.

THIRD CLAIM FOR RELIEF
UNLAWFUL DETENTION CONTRARY
TO THE CITIZEN NON-DETENTION ACT

36. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

37. Respondents' continued detention of Mr. Munaf violates the Citizen Non-Detention Act, 18 U.S.C. § 4001(a). The Act commands that: "No citizen shall be imprisoned or otherwise detained by the U.S. except as pursuant to an Act of Congress." No Act of Congress authorizes the continued detention of Mr. Munaf, and therefore his detention violates the Citizen Non- Detention Act.

FOURTH CLAIM FOR RELIEF
UNLAWFUL DETENTION CONTRARY
TO ARMY REGULATIONS

38. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

39. Respondents' arrest and detention of Mr. Munaf violates Army Regulation 190-8, which prohibits the prolonged and unlawful detention of civilians. *See, e.g.*, Army Regulation 190-8 at 1-6(g) ("Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty shall be imposed.").

40. By Respondents' own admission, Mr. Munaf is a civilian held without charge who presents no security threat to the U.S., and who has been denied access to a competent tribunal. Ex. 1 (Mohammed Decl.) ¶ 17. His detention therefore violates Army Regulation 190-8 and the Administrative Procedures Act, 5 U.S.C. § 701 *et seq.*

FIFTH CLAIM FOR RELIEF
PROLONGED ARBITRARY DETENTION IN VIOLATION OF INTERNATIONAL LAW

41. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

42. Respondents continue to breach their obligations under customary international law, accepted by, and binding on, the U.S., by seizing and continuing to hold Mr. Munaf, a U.S. citizen, without justification, charge, or judicial proceeding. International law, as defined by the International Covenant on Civil and Political Rights and according to the customary international law of armed conflict and international human rights, prohibits prolonged arbitrary detention of noncombatants such as Mr. Munaf.

SIXTH CLAIM FOR RELIEF
DENIAL OF ACCESS TO COUNSEL UNDER THE FIFTH AMENDMENT TO THE U.S. CONSTITUTION

43. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

44. Respondents have denied Mr. Munaf access to American counsel and ignored his repeated requests for access to U.S. counsel and courts. This conduct violates the Fifth Amendment to the U.S. Constitution, which prohibits the government from denying American citizens in its custody access to counsel when they request it.

SEVENTH CLAIM FOR RELIEF
THREAT OF UNLAWFUL TRANSFER TO FOREIGN SOVEREIGN

45. Petitioners re-allege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

46. Respondents threaten to transfer Mr. Munaf to Iraqi custody at any time without advance notice to counsel or to the Court, without legal authority, and without an opportunity for Mr. Munaf to challenge the basis for his prolonged detention, notwithstanding the substantial risk that he would be tortured and denied due process if handed over to the Iraqis.

47. The transfer or threatened transfer of a U.S. citizen to a foreign sovereign without judicial review, without lawful authority, and without an opportunity to challenge the basis for his detention violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution; the federal habeas corpus statute, 28 U.S.C.

§ 2241; the Habeas Corpus Suspension Clause, Art I, § 9, cl. 2; Common Article 3 of the Geneva Conventions; and customary international law.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

(A) Order Respondents to ensure that Mr. Munaf receives a copy of this petition, and any Order this court may issue;

(B) Order Respondents to allow undersigned counsel to meet with Mr. Munaf, in private and unmonitored attorney-client conversations, by phone, by video conference, and in person;

(C) Order Respondents to cease all interrogations of Mr. Munaf, whether direct or indirect, in the absence of undersigned counsel;

(D) Issue a Writ of Habeas Corpus requiring Respondents to release Mr. Munaf from detention, and requiring Respondents to bring Mr. Munaf before a court of competent jurisdiction in the U.S. to show just case for his continued detention;

(E) Convene an evidentiary hearing and order Respondents to produce Mr. Munaf in person for the hearing;

(F) Issue an injunction prohibiting the U.S. from transferring Mr. Munaf to the legal or physical custody of another soveriegn; and

(G) Order such other relief as the Court may deem necessary and appropriate to protect Mr. Munaf's rights.

Dated: August 15, 2006

Respectfully submitted,

SUSAN L. BURKE
SUSAN L. BURKE (D.C. Bar # 414939)
BURKE PYLE LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6596
Facsimile: (215) 482-0874

JOSEPH MARGULIES
MACARTHUR JUSTICE CENTER,
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60201
Telephone: (312) 503-0890

Jonathan Hafetz
Aziz Z. Huq
BRENNAN CENTER FOR JUSTICE
AT NEW YORK UNIVERSITY LAW
SCHOOL
161 Avenue of the Americas
12th Floor
New York, NY 10013
Telephone: (212) 998-6730
Facsimile: (212) 995-4550

Counsel for Petitioners

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-1455 (RCL)

MAISOON MOHAMMED, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

DECLARATION OF JOHN D. GARDNER

I, Major General John D. Gardner, pursuant to 28 U.S.C. § 1746, hereby declare and say as follows:

1. I currently serve as the Deputy Commanding General for Detainee Operations (DCG-DO) Multi-National Force-Iraq (MNF-I). In this capacity, I am charged with the responsibility for oversight in several areas, including:

- Safeguard and secure all persons who are in custody at the MNF-I detention centers and protected areas.

- Operation and focus of the MNF-I Joint Interrogation and Debriefing Center to provide high-quality actionable strategic, operational, and tactical intelligence to the warfighters.

- Maximize efficiency and provide due process in the referral of security internees and detainees to the Iraqi legal system.

- Integrate Iraqi leadership and partnership in all facets of Detainee Operations.

I make these statements based upon my personal knowledge and upon information made available to me in the performance of my official duties.

2. MNF-I is a coalition force consisting of approximately twenty-seven different nations that operates in accordance with the mandate of United Nations Security Council Resolutions (UNSCR) 1546 (2004) and 1637 (2005). Resolution 1637 extended the mandate of MNF-I for another year on behalf of and at the request of the Iraqi government. MNF-I is authorized "to take all necessary measures to contribute to the maintenance of security and stability in Iraq." Such measures include the ability to detain individuals "where this is necessary for imperative reasons of security."

3. Mr. Mohammed Munaf Mohammed (Munaf), a citizen of Iraq, Romania, and the United States, is in MNF-I custody pursuant to UNSCR 1546 and 1637, which allows MNF-I to intern individuals who are considered to be an imperative threat to the security of Iraq. He was captured by Coalition Forces on May 23, 2005.

4. Munaf was captured on May 23, 2005 during a targeted raid. He was detained by Coalition Forces for his suspected involvement in the kidnapping of foreign nationals (three Romanian journalists).

5. Following Munaf's capture, on July 18, 2005 a panel of three Military officers, acting in their capacity as members of MNF-I, conducted a comprehensive review of Munuf's status and detention. The panel reviewed the facts and circumstances surrounding the capture, interviewed witnesses, and considered available intelligence information. Munaf was present at the hearing and had the opportunity to hear the basis on which he was being detained, to make a statement, and to call witnesses who were immediately available. The panel determined that Munaf was considered a security internee and should be further interned.

6. Subsequently, Munaf's case was referred to the Central Criminal Court of Iraq (CCCI) for adjudication. U.S. authorities indicated no objection to Iraqi plans to prosecute Mr. Munaf in the CCCI.

7. The CCCI in Baghdad is the only court in Iraq with nationwide jurisdiction, thereby eliminating venue and jurisdictional issues across the various courts of session among the 18 provinces. The CCCI has discretionary investigative and trial jurisdiction over all crimes that threaten the sovereignty of Iraq and crimes against Coalition Forces, including acts of terrorism. The CCCI operates under the Iraqi Penal Code of 1969 and the 1971 Iraqi Law on Criminal Proceedings. It is an Iraqi court under Iraqi governance and it is compromised of Iraqi judges who have attended the Iraqi Judicial School and is administered by the Iraqi Higher Judicial Council.

8. The CCCI operates using a modified continental, inquisitorial judicial process, and not the English adversarial judicial system. The CCCI is divided into two chambers—an investigative court and a felony trial

court. Under this system, the investigative judge conducts an investigative hearing in chambers to determine if there is sufficient evidence to warrant a trial. Witnesses provide sworn testimony and the investigative judge questions the witnesses to clarify their testimony. Defense counsel is allowed to present questions to the court for review. If the investigative judge accepts any question, he asks the question of the witness. Upon the conclusion of evidence presentation, the investigative judge questions the defendant, who is not required to respond. The investigative judge makes the determination of whether there are sufficient grounds to forward the case to the Trial Court. If he finds there is sufficient evidence, he forwards a report of the investigative proceeding and recommends charges to the Trial Court.

9. The Trial Court sits in panels of three judges, who review the findings of the investigative judges and listen to any additional evidence in a formal courtroom setting. After a case is forwarded for trial, a Trial Panel may return the case for further investigation before a date is set for trial. Trial Panel judges may ask questions, similar to the process used in the investigative hearing. Upon the conclusion of the case, the Trial Panel judges enter a verdict and either release the defendant or sentence him, which can include a prison term. Sentences imposed by the Trial Court are those prescribed in the Iraqi Penal Code as amended by CPA orders. Sentences may be reduced at the discretion of the Chief Judge of the Trial Court while appeals are made to the Iraqi Court of Cassation.

10. Defendants are represented at the investigative hearing by counsel retained at their own expense, or, more typically, by court-appointed defense counsel. De-

fense counsel at the investigative hearing functions primarily to ensure the defendant's procedural rights are not violated. The defendant is also entitled to court-appointed defense counsel for trial. Munaf is represented by his own Iraqi Counsel.

11. Munaf admitted on camera, in writing, and in front of an Iraqi Investigative Hearing Judge that on 28 March 2005 he participated as an accomplice in the kidnapping of three Romanian journalists. Munaf was assisted by Ibrahim Al Giuburi (Munaf's brother-in-law) (Ibrahim), Omar Hayssam (the alleged mastermind of the kidnapping plan) (Hayssam), and Omar Mahmmod (Hayssam's brother).

12. Munaf has made several confessions in writing, on camera, and in front of an Iraqi Investigative Hearing Judge outlining the kidnapping plan he was involved in. According to Munaf's multiple statements he first met with Hayssam in January 2005 to discuss the kidnapping plans. The first plan was to kidnap the Romanian Senator Vasile Ion or a Romanian businessman. Hayssam had a close relationship with Senator Ion. Munaf allegedly refused to participate in this plan. The entire reason for Hayssam wanting to conduct a kidnapping stems from his intention to gain the support of the Romanian President Traian Basescu to develop new business in Romania. It appears that Hayssam was going to covertly help kidnap the victims, and then increase his own stature by negotiating their release.

13. According to Munaf, Hayssam developed another plan to kidnap Marie Jeanne Ion (the daughter of Senator Vasile Ion) and two other journalists when they traveled to Iraq. He came up with this plan after allegedly seeing the Al Jazeera story of the Italian journalists

being kidnapped and held for ransom. In this plan, Munaf was to travel with Marie and the other two to Iraq ostensibly as their guide and translator and help facilitate the kidnapping. Hence, Munaf would act as though he was a kidnap victim too.

14. Munaf stated that he was contacted by Hayssam on March 21, 2005, and asked to follow the kidnapping plan. Munaf claims that he opposed the plan but that he agreed to it after much pressure was to put on him to go along. Munaf met with Ibrahim in Iraq a few days before the kidnapping and received a more detailed description of the kidnapping plan. The kidnapping was to take place on March 28, 2005, at an arranged location about 70 kilometers outside of Baghdad. According to Munaf, on the morning of March 28, Munaf met with Ibrahim and a man named Hagji (the apparent contracted kidnapper). Hagji asked for $30,000 - half to be paid before the kidnapping, and half to be paid after the kidnapping. Munaf only had $14,000 at the time, so he called Hayssam to send him the rest. Hayssam said that his brother (Samir) would send the rest of the money the next day. The kidnapping was conducted at the appointed place on March 28th. The kidnappers blocked passage of the victims' car and took hostage Munaf, Marie Jeanne Ion, and the other two journalists.

15. Munaf has appeared at four investigative hearings at CCCI (23 Nov 2005, 19 Jan 2006, 15 Feb 2006, 28 Feb 2006.) Two appearances were made as a witness against the other defendants and two appearances were made as a defendant. Although Munaf remains in the physical custody of MNF-I, the government of Iraq has control over the disposition of Munaf's case because the

criminal proceedings before the CCCI already have been initiated.

16. At both sets of investigative hearings, acting as both a witness and a defendant, Munaf positively identified the other kidnappers and admitted to his role in the original kidnap scheme. The Iraqi judge presiding over Munaf's investigative hearing has determined that sufficient evidence exists to bring Munaf's case to a Trial Panel as a defendant. In addition, Munaf is also involved in another trial as a victim. The Iraqis docketed both trials for September 10, 2006, but they were postponed until September 19, 2006. Munaf will likely be charged with kidnapping and an accomplice to kidnapping at his trial.

17. MNF-I maintains physical custody of detainees while their cases are being heard by the CCCI. They are held as security internees in accordance with UN Security Council Resolutions 1546 and 1637 until the case is resolved. If they are convicted and sentenced to a term of imprisonment, the Trial Court will issue an Order, which is sent to Task Force 134. There is no set time frame for when Iraqi Trial Courts formally document convictions. Generally, this occurs within a few days of trial. Once the original formal Trial Court documentation is received and processed, we will issue a subsequent transfer order releasing the detainee to an Iraqi Ministry of Justice facility. Once we formally direct transfer from MNF-I to the Iraqi Ministry of Justice, the normal administrative period for actual transfer, which may be affected by myriad factors, is approximately two to three weeks.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 15th day of September 2006.

/s/ JOHN D. GARDNER
JOHN D. GARDNER
Major General, U.S. Army
Deputy Commanding General
Detainee Operations

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-1455 (RCL)

MAISOON MOHAMMED, ET. AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL. RESPONDENTS

DECLARATION OF SEAN RIORDAN

I, Sean Riordan, declare under penalty of perjury that the following statements are true and correct, to the best of my knowledge, information, and belief:

1. I am a third year student at UCLA School of Law. I am presently working for the semester as a full-time legal intern at the Brennan Center for Justice at NYU School of Law. I have conversational ability in Arabic.

2. On September 19, 2006, I spoke by telephone with Batool Mohammed ("Batool"). Batool is Mr. Munaf's sister. She lives in Baghdad and was reached by telephone.

3. Maisoon Mohammed, the sister of Batool and Mr. Munaf, joined the September 19, 2006 telephone call with Batool and helped translate between English and Arabic in order to ensure accuracy.

4. During the telephone call, Batool conveyed to me the information contained in paragraphs 5-11 of this declaration. Batool told me that she is perfectly willing to execute a declaration in her own name, but that the security situation in Baghdad is so perilous that it is not safe for her to travel to a fax machine. She told me, however, that all of the information in paragraphs 5-11 of this declaration is true and correct. Batool further stated that she obtained all of the information in paragraphs 5-11 of this declaration from her visits with Mr. Munaf in prison and her conversations with Mr. Munaf by telephone.

5. Mr. Munaf has been held in United States custody in Iraq since May 2005, and remains in U.S. custody today.

6. During his confinement, Mr. Munaf has been threatened with torture and subjected to abuse and mistreatment in an effort to coerce statements from him.

7. For more than seven months Mr. Munaf was held in complete isolation in a small box-like cell.

8. Mr. Munaf and his family have been threatened with violence by both U.S. and Romanian officials. Officials told Mr. Munaf that if he did not confess to criminal acts that both he and his sister in Iraq would be sexually assaulted. Officials also told Mr. Munaf that if he did not confess to wrongdoing, his wife in Romania would be sexually assaulted.

9. Mr. Munaf know that other detainees in the same prison have been beaten and tortured by officials to coerce statements.

10. Mr. Munaf has maintained and continues to maintain his innocence. Any incriminating statements that he might have made were the direct result of coercion and threats.

11. Mr. Munaf is currently scheduled for his next hearing in Iraqi criminal court on September 24, 2006. At this hearing, Mr. Munaf plans to explain the coercion and threats that he has been subjected to and his family believes he will attempt to clear his name.

Date: September 20, 2006 /s/ SEAN RIORDAN
SEAN RIORDAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-1455 (RCL)
MAISOON MOHAMMED, ET. AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

SUPPLEMENTAL DECLARATION OF SEAN RIORDAN

I, Sean Riordan, declare under penalty of perjury that the following statements are true and correct, to the best of my knowledge, information, and belief:

1. I am a third year student at UCLA School of Law. I am presently working for the semester as a full-time legal intern at the Brennan Center for Justice at NYU School of Law. I have conversational ability in Arabic.

2. On October 12, 2006, I spoke by telephone with Badie Arrief Izzat. Mr. Izzat is Petitioner Mohammed Munaf's lawyer in Iraq. Mr. Izzat was reached at 011 964 (790) 130 6472.

3. Petitioner Maisoon Mohammed, Mr. Munaf's sister who lives in Detroit, Michigan, participated in the October 12, 2006 telephone call with Mr. Izzat and helped translate between English and Arabic in order to ensure accuracy.

4. During the telephone call, Mr. Izzat conveyed to me all of the information contained in paragraphs 5-15 of this declaration. Mr. Izzat said he is willing to execute a declaration in his own name, but authorized me to provide this declaration on his behalf because of the imminent, irreparable harm to Mr. Munaf and logistical problems of sending a fax from Baghdad. He affirmed that all of the information contained in paragraphs 5-15 of this declaration is true and correct based upon his first-hand knowledge.

5. On the morning of October 12, 2006, Mr. Munaf and several other co-defendants were convicted and sentenced to death by Judge 'Abd al-Amir Abdullah Al-Rubaay of the Central Criminal Court of Iraq.

6. No witnesses for the defendants were present at the October 12, 2006 proceeding ("the proceeding") because Judge Al Rubaay and the defendants' lawyers had previously agreed that the charges would be dropped. The Romanian embassy had not come forward to press charges, and there were no grounds for prosecution. As a result, the defendants' lawyers arrived at the proceeding believing the case would be dismissed. Indeed, Mr. Badie had previously been told by the judge, off-the-record, that Mr. Munaf would be acquitted.

7. Two United States military officials attended the proceeding. One was an American soldier who stated to the court that he was appearing on behalf of the Romanian embassy to seek the death penalty for Mr. Munaf and the other de-

fendants. He did not offer any written proof that he had been delegated to represent the Romanian embassy. The other official was an American general who told the judge in open court that the defendants should all be convicted and sentenced to death.

8. Judge Al-Rubaay disagreed with the general.

9. During the proceeding, Mr. Munaf told the judge that he had previously made incriminating statements because American and Romanian officials had told him that if he did not confess they would beat him and would sexually assault members of his family in Romania and Iraq. Mr. Munaf stated that he was completely innocent.

10. Most of the defendants showed to Judge Al-Rubaay the physical marks on their bodies from beatings they received while in U.S. custody.

11. The American general insisted that the defendants were guilty and that they should be executed.

12. Judge Al-Rubaay then excluded from the court everyone except the military officials and his judicial assistants. He met with the two American military officials and his judicial assistants for 15 minutes. Neither the defendants nor their counsel were present during that meeting.

13. When the defendants and their counsel were again admitted to the court, Judge Al-Rubaay convicted and sentenced Mr. Munaf and four other defendants to death. Judge Al-Rubaay

did not provide any oral or written justification for the convictions or sentences.

14. The entire proceeding lasted only an hour-and-a-half. No evidence or witnesses were presented to the court.

15. In 36 years practicing law in Iraq, Mr. Izzat had never before seen or heard of a death sentence being handed down without deliberation or consideration of the merits.

Dated: October 12, 2006 /s/ SEAN RIORDAN
SEAN RIORDAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-1455 (Rcl)

MAISOON MOHAMMED, ET. AL., PETITIONERS,

v.

FRANCIS J. HARVEY, ET. AL., RESPONDENTS

SECOND SUPPLEMENTAL DECLARATION OF SEAN RIORDAN

I, Sean Riordan, declare under penalty of perjury that the following statements are true and correct, to the best of my knowledge, information and belief:

1. I am a third year student at UCLA School of Law. I am a full-time intern at the Brennan Center for Justice at NYU. I have conversational ability in Arabic.
2. On October 16, 2006 I spoke by telephone with Batool Mohammed ("Batool"). Batool is the sister of Petitioner Mohammed Munaf ("Mr. Munaf.") She lives in Baghdad. She was reached by telephone at [Redacted].
3. Petitioner and next friend Maisoon Mohammed, the sister of Batool and Mr. Munaf, joined today's telephone call with Batool and helped translate between English and Arabic in order to ensure accuracy.
4. During the telephone call, Batool conveyed to me all of the information contained in paragraphs 5-9

of this declaration. Batool said she was willing to execute a declaration in her own name, but authorized me to provide this declaration on her behalf because of the danger of traveling to or from a location with a fax in Baghdad. Batool affirmed that all of the information she conveyed to me is true and correct and is based on a visit with Mr. Munaf at Camp Cropper on October 15, 2006.

5. After being convicted and sentenced to death on October 12, 2006, by the Central Criminal Court in Iraq, Mr. Munaf was transferred to a windowless cell, approximately 2 meters by 2 meters in dimension, where he is kept in solitary confinement 23 hours a day. All of his clothes and personal possessions except for a Koran have been taken from him, and he has been forced to wear a yellow suit reserved for individuals sentenced to death.

6. Mr. Munaf broke down and cried upon seeing Batool and other family members. Mr. Munaf told them that for one hour each day he is released into a cage with men who are standing trial for murder. These men have threatened him and he fears that they will hurt him.

7. On several occasions since receiving his death sentence, Mr. Munaf's American custodians have performed painful searches of body cavities which humiliate and degrade him.

8. An American soldier who supervised the visit between Mr. Munaf and his family stated that all future visits and phone calls between Mr. Munaf and his family members would be prohibited. The soldier said that the only reason that the family

was allowed to visit Mr. Munaf on October 15 was that the visit had been arranged prior to Mr. Munaf's death sentence.

9. Mr. Munaf's mother mailed him some nuts and other traditional food so that he could celebrate Ramadan, but Mr. Munaf's American custodians would not deliver these items to him.

Date: October 16, 2006 /s/ SEAN RIORDAN
SEAN RIORDAN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 06-1455 (RCL)

MAISOON MOHAMMED, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

[Oct. 16, 2006]

DECLARATION OF ROBERT M. PIRONE

I, Lieutenant Robert M. Pirone, hereby declare and say as follows:

1. I am a commissioned officer in the United States Coast Guard currently serving as an attorney at the Central Criminal Court of Iraq (CCCI) Liaison Office in Baghdad, Iraq. In this position, I assist in bringing evidence and witnesses to the CCCI at Investigative Hearings (IHs) for cases involving MNF-I Coalition Forces (MNF-I). I also bring complaints on behalf of MNF-I members at the CCCI for crimes against MNF-I soldiers or citizens of MNF-I members.

I make the following statements based upon my personal knowledge:

2. MNF-I is a coalition force consisting of approximately twenty-seven different nations that operates in accordance with the mandate of United Nations Security Council Resolutions (UNSCR) 1546 (2004) and 1637 (2005). Resolution 1637 extended the mandate of MNF-

I for another year on behalf of and at the request of the Iraqi government. The nation of Romania is a member of the MNF-I coalition forces.

3. On October 12, 2006, Mr. Mohammed Munaf Mohammed (Munaf), a Romanian-Iraqi-American citizen, appeared at the CCCI before a Trial Panel consisting of three Iraqi judges—Judge Abdul Ameer Abdul Kareem, Judge As'ad Dawood Salman, and Judge Dawood Abdul Kareem—to face kidnapping charges under Article 421 of the Iraqi Penal Code, the substance of which were previously the subject of four CCCI Investigative Hearings (IHs). Munaf was represented at the IHs by Iraqi defense attorneys and at the trial by another Iraqi defense attorney, Mr. Badie Arrief Izzat (Badie). At all of the IHs and the trial, Munaf and his attorneys were given the opportunity to submit any evidence or bring any witnesses in Munaf's defense. The Trial Panel found Munaf, along with his five co-defendants, guilty of kidnapping, and sentenced them to death.

4. Munaf is the only defendant of the six defendants in this case who is or has been in MNF-I custody. The other five detainees are presently in the custody and have always been in the custody of the Iraqi Ministry of the Interior (MOI) or the Iraqi Ministry of Justice (MOJ). At the trial, a single defendant, who has never been in MNF-I custody, lifted his shirt and stated that the Iraqis had beaten him. This defendant made no accusations against MNF-I or anyone other than the Iraqis. Another of the defendants, who is also in Iraqi custody, attempted to show the judges an injury to his arm, but the judges stopped him. This defendant has never been in MNF-I custody and did not make any statements against MNF-I or anyone other than the Iraqis.

No other defendant either displayed physical marks on their persons to the Court or made statements to the Court regarding abuse.

5. Munaf and the five co-defendants previously confessed at an IH, in front of an Iraqi IM Judge, to carrying out and being accomplices in the kidnapping of three Romanian citizens—Marie Jeanne Ion, Sorin Dumitru Miscoci, and Ovidiu Ohanesian.

6. At the trial, the three-judge Trial Panel considered all the evidence presented at the Investigative Hearings. This evidence included the sworn confessions from the defendants that were given to Iraqi IH Judges of the CCCI. The judges of the Trial Panel also questioned all six defendants at the trial and took additional statements from them. At trial, five of the defendants, including Munaf, recanted their previous confessions, alleging that the Iraqis and/or the Romanians had forced them to confess. None of the defendants, including Munaf, alleged that MNF-I had forced them to confess. One defendant did not give a statement to the judges; he refused to answer the Iraqi judges' questions and acted as though he was mentally handicapped. The court requested and heard live testimony of an Iraqi employee from MOJ who stated that this particular defendant did not have any mental problems, was perfectly normal, and had never before acted the way he was then acting before the Court.

7. As part of my responsibilities in bringing complaints on behalf of MNF-I members to the CCCI for crimes against MNF-I soldiers or the citizens of MNF-I members, I appeared at the trial to make the formal complaint for the Romanian Government about the kidnapping of the three Romanian citizens by the defen-

dants. I was sworn-in, and through an interpreter who was also sworn-in, stated that I had met with a member of the Romanian Embassy who authorized me to make this complaint on behalf of the Romanian Government. The Romanian Embassy had authorized me to do this in a signed and stamped letter that had been submitted to the Court weeks in advance of the trial. At no time did I ask or request of the Court that the defendants receive the death penalty or any other penalty. My role and statements were limited to answering the Court's questions about the facts of the case (as stated in the confessions of the defendants), and making the formal complaint, as required by Iraqi law, on behalf of an MNF-I member nation.

8. No other member of MNF-I participated in the trial in any capacity. At no time did an American General, any other officer of the United States, or any General or officer of any MNF-I member nation appear at the trial. None of the other MNF-I personnel who attended the trial with me made any statements at the trial; rather, they merely observed the proceedings or acted as guards.

9. In addition to the statements given by myself, the Iraqi MOJ official, and the five defendants who made a statement, the three Judges of the Trial Panel also received arguments from the Iraqi Prosecutor and multiple defense attorneys. The Iraqi Prosecutor stated that there was enough evidence presented at the IHs and the trial to find the defendants guilty of kidnapping under Article 421 of the Iraqi Penal Code.

10. The Trial Panel then closed the courtroom and asked all persons to leave the courtroom. I and all other MNF-I personnel left the courtroom at that time. Once

the courtroom was cleared, the three judges deliberated. During the entire deliberation time, I stood out in the court lobby and had a conversation with Munaf's Iraqi attorney, Badie. At no time during the trial was I present in the courtroom with members of the court when defense counsel were not also present.

11. Munaf's trial had been scheduled and delayed several times over many months based on objections from his attorney, Badie. During these months of delay, the evidence in the case file at CCCI was available for inspection by Munaf's attorney, Badie. After several delays, I was personally present on September 24, 2006 when Badie appeared before Judge Abdul Kareem and the judge asked Badie if he had any more objections and whether he was ready to proceed. Badie stated he had no more objections, and was ready to proceed. Badie and Munaf both signed a notification that the trial would proceed on a specified date. There were no assertions made at this meeting by the judge that case would be withdrawn, the charges would be dropped, or Munaf would be acquitted. I am not aware of any statements by any of the three judges in Munaf's case that the case would be withdrawn, the charges would be dropped, or Munaf would be acquitted.

12. Based on my prior first-hand participation in and observation of numerous CCCI Trial Panel proceedings, the proceedings of the October 12, 2006 Trial Panel that resulted in Munaf's conviction and sentencing were conducted in an orderly manner and followed established procedures of the CCCI.

13. Under the Iraq Law of Criminal Proceedings of 1971, Paragraph 224/D, a defendant who receives a death penalty gets an automatic appeal to the Iraqi

Court of Cassation. The defendant has thirty days from the day after sentencing to submit materials to the Court of Cassation for his appeal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on the 16th day of October, 2006.

/s/ ROBERT M. PIRONE
ROBERT M. PIRONE
Lieutenant, U.S. Coast Guard
CCCI Liaison Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. CV 06-1455 (RCL)

MAISOON MOHAMMED, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

Oct. 19, 2006

ORDER

In accordance with the Memorandum Opinion issued this date, and upon consideration of the petitioners' Petition [1] for Writ of Habeas Corpus, the Motion [6] and Supplemental Motion [12] for Temporary Restraining Order, the opposition, reply thereto, and supplemental materials, and after hearing argument and considering the applicable law and the entire record herein, it is hereby

ORDERED that petitioners' Petition [1] for Writ of Habeas Corpus is DISMISSED with prejudice for lack of subject matter jurisdiction; and it is further

ORDERED that the Motion [6] and Supplemental Motion [12] for Temporary Restraining Order are DENIED as moot.

SO ORDERED.

Signed by Royce C. Lamberth, United States District Judge, October 19, 2006.

WHO IS LYING: IN MUNAF'S CASE?

21 October 2006	By Marina Constantinoiu

An American lieutenant, states that he was present at the trial of Muhamad Munaf, in Iraq, in order to formulate an official complaint on behalf of the Romanian Government. The Romanian [Government] knows nothing about it. If that's the case, where does the truth lie?

A week after learning the news regarding the death penalty sentence by hanging, of Mohamad Munaf, the Iraqi-American guide of the Romanian hostages in Iraq, the fog regarding the trial where the sentence has been pronounced is getting thicker.

While, last Saturday, the Romanian authorities stated that they did not know anything about Munaf's trial in Baghdad, yesterday we learned that a lieutenant by the name of Robert Pirone, legal counselor at the Liaison Office—Central Iraqi Tribunal in Baghdad, was present at the Court proceedings, to formulate the official complaint on behalf of the Romanian Government.

THE DENIAL On Thursday, the Courts of District of Columbia rejected the American lawyers' the petition, which requested that Muhamad Munaf should not be handed over to the Iraqis after being sentenced to death. The Washington Courts rejected the petition (as 'unfounded') and declined Its own competence to deal with the case of the accused/defendant, arguing that it did not apply to Its' jurisdiction, because he [the defendant] was under the Multinational Force custody. According to MEDIAFAX, Jonathan Hafetz, one of Munaf's lawyers in the US, considers [deems] the decision

unfair and states that he would appeal to a Federal Court.

THE SURPRISE FACTOR The statement introduction (on which the sentence was based), contains many precious [pieces of] information, which makes the case of Munaf an even deeper mystery. Thus, we learn that, according to the reasoning/argument presented and signed by Judge Royce C. Lamberth, representing the Pentagon—plaintiff in the trial brought by Munaf's lawyers in the US—stated that Pirone was present at the trial, as a member of the Multinational Force in Iraq. He declared, under oath, that he attended the trial in order to launch "an official complaint on behalf of the Romanian Government, regarding the hostage taking where Romanian nationals [citizens] were the victims". At the trial, Pirone was under oath: and the "'notarized authorization [i.e. notarized power of attorney] to represent the Romanian Embassy at the trial has been filed a few weeks before"

MANDATE He stressed the fact that his presence at the trial was restricted to answer questions regarding the case, based on previous testimonies of the people accused, and also, to launch an oficial complaint, in accordance with the Iraqi legislation.
Was he there on his own? Was that HIS idea?
Pirone states that Munaf and the other 4 sentenced to death, had the right to make their own statements. Munaf has given a statement, re-affirming that he is innocent, and that the previous confessions were taken by using coercive means.

According to Pirone, no other member of the Multinational Force, was present at the trial; other present members were only as observers and guardians. "No

American General, or Military General was present to represent any country of the coalition"—says Pirone. One more detail that contradicts previous statements, even of that of the President Basescu; according to the document signed by the American Judge, "the Romanian hostages have been set free in May 2005, during a raid conducted by the troops under the Multinational Forces Command". President Basescu stated at 22nd of May, that setting the hostages free is: 'an operation executed 100% by the Romanian Secret Information Services'.

APPEALS: Based on the same document, released by Mr. Jonathan Hafetz—Mr. Munaf defense lawyer, and published in the 'Jurnalul National[1]', we learn that the procedures to transfer detainees (who have been previously sentenced by the Iraqi Courts) in the custody of the Multinational Forces, takes two to three weeks. A death penalty sentence case has automatically right to appeal to Higher Courts[2] , within 30 days since the sentencing.

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[1] Translator's Note - "Jurnalul National" - Romanian Newspaper.

[2] Translator's Note - "Curtea de Casatie" - Highest Courts - Federal/ Supreme Court.

JUSTICE DEPARTMENT CLAIMS NO INOLVEMENT

The Ministry of Justice claims it had no knowledge of delegating any American officer to represent the Romanian Government in the Munaf trial. Mr. Razvan Radu, Department Chief—International Law and Treaties Direction, stated that: "Ministry has not given power of attorney to any American lawyer to represent the Romanian Government during the trial". According to him, the institution he is representing, had no knowledge about such representation. "It didn't make any sense to authorize anyone to represent the Romanian Government, considering the fact that our country [i.e. Romania] has exercised (and still does), its own jurisdiction regarding the accusations brought against Munaf. Right from start, legal proceedings in the case of the Romanian hostages, have been executed by the Romanian Appellate Courts; the indictment written by the Romanian prosecutors, as well as the brief have been sent to the local jurisdiction. Both the Iraqi and American have been notified", says Mr. Razvan Radu. Theoretically, both Romania and Iraq had the competence to conduct legal proceedings; because the victims were Romanian citizens and because the crime has taken place there [i.e. Iraq]." What we have here is a conflict of jurisdiction, but the competent Romanian authorities (Appellate or other Courts) have never requested legal proceedings be transferred to local Iraqi courts", said Mr. Razvan Radu.

***Miruna Pasa**

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JURNALUL NATIONAL

ULTIMA ORA

Miercuri, 25 Octombrie 2006

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Prima Pagina

Cine minte in cazul Munaf?

21 Octombrie 2006 | de Marina Constantinoiu

Un locotenent american afirma ca a participat la procesul din Irak al lui Mohammad Munaf, pentru a formula plangerea oficiala din partea Guvernului roman. Romanii nu stiu nimic. In cazul asta, unde-i adevarul?

La o saptamana de la aflarea vestii privind condamnarea la moarte prin spanzurare a ghidului irakiano-american al ziaristilor romani rapiti in Irak, Mohammad Munaf, ceata in legatura cu procesul in care s-a dat sentinta s-a indesit. De bine ce sambata trecuta, autoritatile romane spuneau ca nu stiau nimic despre un proces al lui Munaf la Bagdad, ieri am aflat ca un anume locotenent Robert Pirone, avocat la biroul de legatura cu Tribunalul Penal Central Irakian din Bagdad, ar fi fost prezent la tribunal, pentru a formula plangerea oficiala din partea Guvernului roman.

RESPINGERE. Tribunalul districtului Columbia a respins joi petitia avocatilor americani prin care se cerea ca Mohammad Munaf sa nu fie predat autoritatilor irakiene, dupa condamnarea acestuia la moarte. Tribunalul din Washington a respins ca "neintemeiata" petitia si si-a declinat competenta in abordarea cauzei condamnatului, argumentand ca nu intra in jurisdictia sa, el aflandu-se in custodia Fortei multinationale. Jonathan Hafetz, unul dintre avocatii lui Munaf din SUA, considera nedreapta decizia si afirma ca va face apel la o curte de apel federala, potrivit Mediafax.

SURPRIZA. In preambulul motivatiei care a stat la baza deciziei sunt cuprinse insa informatii pretioase, care adancesc si mai tare misterul din cazul Munaf. Astfel aflam, conform motivatiei semnate de judecatorul Royce C. Lamberth, ca reprezentantii Pentagonului - parte reclamata de avocatii lui Munaf din SUA - afirma ca locotenentul Pirone a fost prezent la proces in calitate de membru al Fortei Multinationale din Irak. Acesta ar fi declarat, sub juramant, ca a fost prezent la tribunal

ALTE VREMURI. Ghidul zi rapiti in Irak, la momentul ostatic", alaturi de

Preferinte
Adauga comentariu
Vezi comentarii
Trimite pe email
Varianta print
Mai multe de Marina Const
Din aceeasi sectiune

Observator
- Romania eterna
- Provocare - Votati rocku
- Editie de colectie - Cata
- Cumparari - Vanzari - En
- Cine minte in cazul Mun
- Observator - Romania in
- Optiune - Scoli de lux cu
- Criminal in libertate
- D-ale globalizarii

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pentru a face "o plangere oficiala din partea Guvernului Romaniei referitoare la rapirea ale carei victime au fost romani". Pirone a fost sub juramant la proces, iar "autorizatia legalizata la notariat de a reprezenta Ambasada Romaniei a fost depusa la tribunal cu cateva saptamani in urma".

- Scandal - Boieru' fara co
- Rechizitoriu - Seful AFA crima
- Cazul Tinu - Se cere relu

Toata arhiva - Observato

MANDAT. El a subliniat ca prezenta sa la proces s-a limitat la a da raspunsuri intrebarilor legate de caz, pe baza marturiilor anterioare ale acuzatilor, si a face plangerea oficiala, in conformitate cu le irakiana. De capul lui oare? Pirone sustine ca Munaf si cellalti patru condamnati la moa dreptul sa faca declaratii. Munaf ar fi dat o declaratie, reafirmand ca este nevinovat s anterioare i-au fost luate prin mijloace coercitive.

Potrivit lui Pirone, nici un alt membru al Fortei Multinationale nu a mai participat la p membri ai acesteia prezenti in sala erau observatori si gardieni. "Nu a fost prezent nici american si nici un general reprezentand o alta tara membra a coalitiei", spune Pirone care contrazice declaratii anterioare, chiar ale presedintelui Basescu: conform docum de judecatorul american, "ostaticii romani au fost eliberati in mai 2005 intr-un raid al sub comanda Fortei Multinationale". Presedintele Basescu afirma, la 22 mai, ca elibera operatiune executata 100% de serviciile de informatii ale statului roman".

DREPTURI. Din acelasi document, pus la dispozitia Jurnalului National de catre avocat lui Munaf, Jonathan Hafetz, aflam ca procedurile de transferare a detinutilor aflati in Multinationale si condamnati de o curte irakiana dureaza doua-trei saptamani. Un con moarte are dreptul la recurs automat la Curtea Irakiana de Casatie, avand la dispozitie pronuntarea sentintei pentru a inainta dosarul catre aceasta instanta.

JUSTITIA NEAGA ORICE IMPLICARE

Ministerul Justitiei sustine ca nu a avut cunostinta despre delegarea vreunui ofiter americar reprezinte statul roman in procesul lui Munaf. Seful Directiei Drept International si Tratate institutiei, Razvan Radu, ne-a declarat ca "Ministerul nu a imputernicit nici un ofiter americ Guvernul roman in proces". Potrivit acestuia, institutia la care lucreaza nu a stiut nimic des reprezentare. "Nici nu ar fi avut sens sa imputernicim pe cineva care sa reprezinte statul ro cat tara noastra si-a exercitat si isi exercita in continuare propria jurisdictie cu privire la ac Munaf. Inca de la inceput, urmarirea penala in cazul rapirii jurnalistilor romani s-a exercita Romania, rechizitoriul intocmit de procurorii romani impreuna cu dosarul au fost trimise sp instantei din tara. Atat autoritatile irakiene, cat si cele americane au fost notificate", ne-a Radu. Teoretic, atat Romania, cat si Irakul erau competente sa judece cazul: tara noastra, victimele au cetatenie romana, iar Irakul, pentru ca fapta s-a petrecut acolo. "Avem de-a fi de jurisdictie, dar niciodata autoritatile romane competente, instanta sau parchet, nu au c procedurilor judiciare catre cele irakiene", a declarat Razvan Radu.

- **Miruna Pasa**

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[Seal Omitted]
MINISTERUL JUSTIŢIEI

DEPARTAMENTUL DE PRESĂ COOPERARE CU ORGANIZAŢIILE NEGUVERNAMENALE

2 Noiembrie 2006

COMUNICAT

Ministrul justiţiei solicită din nou autorităţilor străine competente sprijinul pentru audierea lui Mohammad Munaf

Ministrul justiţiei, Monica Macovei, i-a transmis joi, 2 noiembrie 2006, o scrisoare procurorului general, şeful Departamentului de Justiţie al SUA, Alberto Gonzales, în care îi solicită sprijinul pentru ca Mohammad Munaf să fie audiat de instanţele româneşti, înainte de a fi transferat autorităţilor irakiene. Noua solicitare este motivată de faptul pe 27 octombrie 2006, Curtea de Apel a SUA a dispus ca Mohammad Munaf să nu fie transferat autorităţilor irakiene până pe 6 noiembrie 2006.

Ministrul justiţiei precizează în scrisoare că face acest demers întrucât aducerea lui Mohammad Munaf în faţa instanţelor româneşti este o prioritate a autorităţilor judiciare din România.

În acelaşi timp, ministrul justiţiei i-a adresat o scrisoare şi dlui. Hashim Abderrahman al-Shibli, ministrul justiţiei din Republica Irak, prin care îi solicită sprijinul pentru soluţionarea, de urgenţă, a ultimelor cereri de asistenţă prin care s-a solicitat audierea, sub forma unei comisii rogatorii clasice sau prin videoconferinţă, a cetăţeanului american şi irakian Mohammad Munaf. Începând cu luna decembrie 2005, Ministerul român al Jus-

tiţiei a transmis 5 cereri de asistenţă judiciară formulate în cauzele penale aflate pe rolul Curţii de Apel Bucureşti privindu-l pe Mohammad Munaf.

La solicitarea Ambasadei României la Washington, Ministerul Justiţiei a transmis totodată o Infogramă în care precizează că nu a împuternicit niciun oficial american să reprezinte statul român în cadrul procedurilor judiciare irakiene privindu-l pe Mohammad Munaf.

Autorităţile române nu au renunţat niciun moment la audierea lui Mohammad Munaf în cauzele privind răpirea, în anul 2005, a trei jurnalişti români. În acest sens, începând cu luna decembrie 2005, România a solicitat repetat asistenţa autorităţilor irakiene şi americane pentru soluţionarea cauzelor penale aflate pe rolul Curţii de Apel Bucureşti. Autorităţile române solicită audierea lui Mohammad Munaf în calitate de inculpat în dosarul nr. 6595/2/2006 al Curţii de Apel Bucureşti, Secţia I Penală şi în calitate de martor în dosarul nr. 33970/2/2005 al aceleiaşi instanţe.

DEPARTAMENTUL DE PRESĂ

[Seal] ROMANIA
Ministry of Justice

MINISTRY OF JUSTICE

"PRESS AND COOPERATION WITH OTHER NON-GUVERNMENTAL ORGANIZATION" DEPARTMENT

2 November 2006

PRESS RELEASE

Ministry of Justice Requests Again Support From Foreign Authorities In the Case of Mohamad Munaf Hearing

On Thu, 2nd of November 2006, Ms. Monica Macovei, the [Romanian] Minister of Justice, dispatched a letter to Mr. Alberto Gonzales, **General Prosecutor and Chief of the US Justice Department,** requesting his support to **have a hearing conducted by the Romanian Courts, in the case of Mohamad Munaf, before his transfer to the Iraqi authorities.**

The new request is based on the fact that on 27th of October 2006, the US Court of Appeal has issued a disposition according to which Mohamad Munaf should not be transferred to the Iraqi authorities before 6th of November 2006.

The Ministry of Justice stated in the letter that she takes this step because 'presenting the case (Mohamad Munaf's case) before the Romanian Courts is a priority of the Romanian judicial authorities'.

At the same time, the Ministry of Justice, addressed a letter, also to **Mr. Hashim Abderrahman al-Shibli, the Iraqi Minister of Justice,** requesting his support for **urgent resolution, of the last requests for assistance to have**

a hearing, in the form of a classic Rogatory Commission or a video-conference, in the case of Mohamad Munaf, who has dual US and Iraqi citizenship. Since December 2005, the Romanian Ministy of Justice has issued 5 **applications for judiciary assistance,** — formulated in penal cases under the docket of the Appeal Court in Bucharest — in the case of Mohamad Munaf.

At the request of the Romanian Embassy in Washington, the Ministry of Justice has also dispatched an info gram, which states that **the Embassy has not authorized any American official to represent the Romanian Government during the Iraqi judicial procedures, with respect to Mohamad Munaf.**

Romanian Authorities **never gave up the idea of a hearing in the case of Mohamad Munaf,** in the case of the three Romanian journalists kidnapping, in 2005. Thus, since December 2005, **Romania has repeatedly requested American and Iraqi Authorities' assistance, to resolve the penal cases found in the docket of the Appeal Court in Bucharest.** Romanian Authorities are requesting a hearing in the case of Mohamad Munaf, as 'the accused" in the case Nr. 6595/2/2006 (Appeal Court in Bucharest, Penal Department) and as "a witness" in the case Nr. 33970/2/2005 (case adjudicated by the same Court).

PRESS DEPARTMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 06-5126

SANDRA K. OMAR, ET AL., PETITIONERS-APPELLEES

v.

FRANCIS J. HARVEY, ET AL.,
RESPONDENTS-APPELLANTS

DOCKET ENTRIES

DATE	PROCEEDINGS
4/28/06	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Francis J. Harvey, Appellant William H. Brandenburg, Appellant Timothy Houser. [965577-1] (hts) [06-5126]
5/4/06	MOTION filed (5 copies) by Appellees Sandra K. Omar and Ahmed S. Omar (certificate of service by hand dated 5/4/06) to expedite case [966582-1]. Response due on 5/16/06. (mam) [06-5126]
5/4/06	ENTRY OF APPEARANCE filed by Attorney Susan L. Burke for Appellee Ahmed S. Omar, Appellee Sandra K. Omar [966587-1]. (mam) [06-5126]

DATE	PROCEEDINGS
5/4/06	INITIAL SUBMISSIONS filed by Appellees Sandra K. Omar and Ahmed S. Omar [966588-1]: 28(a)(1) certificate. (mam) [06-5126]
5/8/06	RESPONSE filed [967571-1] (5 copies) by Appellants Francis J. Harvey, William H. Brandenburg and Timothy Houser (certificate of service by mail dated 5/8/06) to a motion to expedite case [966582-1]. (mam) [06-5126]
5/8/06	ENTRY OF APPEARANCE filed by Attorney Douglas N. Letter for Appellant Timothy Houser, Appellant William H. Brandenburg, Appellant Francis J. Harvey [967574-1]. (mam) [06-5126]
5/10/06	PER CURIAM ORDER filed [967575] considering motion expedite case [966582-1] and establishing the initial briefing schedule [967575-1]: Appellant's brief and appendix due on 6/2/06; Appellee's brief due on 6/23/06; Appellant's reply brief due on 7/7/06. Clerk directed to schedule case for oral argument in September 2006. Before Judges Henderson, Garland, Brown. [Entry Date: 5/10/06] (mam) [06-5126]

DATE	PROCEEDINGS
6/2/06	BRIEF filed by Appellants Francis J. Harvey, William H. Brandenburg, Timothy Houser [974410-1]. Copies: 15. Certificate of service date 6/2/06, by hand-delivery and Federal Express. (lvs) [06-5126]
6/2/06	JOINT APPENDIX filed by Appellees Sandra K. Omar, Ahmed S. Omar, Appellants Francis J. Harvey, William H. Brandenburg, Timothy Houser [974414-1]. Copies: 10. (lvs) [06-5126]
6/16/06	NOTICE filed by Susan Burke, counsel for Appellees Sandra K. Omar, Appellee Ahmed S. Omar, informing the court of her change of address: Burke Pyle LLC, 4112 Station Street, Philadelphia, PA 19127, Phone: 215-487-6596, Fax: 215-482-0874 [982499-1]. Certificate of service date 6/13/06 by mail. (lvs) [06-5126]
6/19/06	CLERK'S ORDER filed [974840] to schedule oral argument [974840-1] before Judge Initials: DST JRB HTE on 9/11/06 at 9:30 AM. [Entry Date: 6/19/06] (cwc) [06-5126]
6/23/06	BRIEF filed by Appellees Sandra K. Omar and Ahmed S. Omar [978641-1]. Copies: 15. Certificate of personal service date 6/23/06. (krm) [06-5126]

DATE	PROCEEDINGS
6/28/06	MOTION filed (5 copies) by Appellants Francis J. Harvey, et al. (certificate of service dated 6/28/06) for a two-week extension of time to file reply brief. [978718-1] (lej) [06-5126]
7/11/06	PER CURIAM ORDER filed [979482] granting motion extend time [978718-1] The reply brief is now due 7/21/06. [Entry Date: 7/11/06] (lej) [06-5126]
7/21/06	REPLY BRIEF filed by Appellants Francis J. Harvey, William H. Brandenburg, and Timothy Houser [982406-1]. Copies: 15. Certificate of mail service date 7/21/06. (krm) [06-5126]
8/31/06	PER CURIAM ORDER filed [989228] to allocate oral argument times: APET minutes- 15 ERES minutes- 15. [989228-1], one counsel per side to argue. [989228-2] Oral argument scheduled for 9/11/06, Form 72 notice of attorney arguing case - [989228-3] due 9/5/06. [Entry Date: 8/31/06] (cwc) [06-5126]
9/1/06	FORM 72 submitted by Attorney Aziz Zahirul Huq on behalf of appellee Shawqi Omar [990547-1] [990547-2]. (set) [06-5126]

DATE	PROCEEDINGS
9/5/06	FORM 72 filed by Attorney Gregory George Garre on behalf of appellants Francis J. Harvey, Secretary of the Army, et al. [990485-1] [990485-2]. (set) [06-5126]
9/11/06	ORAL ARGUMENT HELD before Tatel, Brown, Edwards. (set) [06-5126]
10/16/06	FIRST CLASS MAIL [1003444-1] sent to Susan Burk [*sic*] RETURNED marked "unclaimed". Mail was a Per Curiam order establishing the initial briefing schedule [967575-1]. (mam) [06-5126]
10/16/06	FIRST CLASS MAIL [1003447-1] sent to Susan Burk [*sic*] RETURNED marked "unclaimed". Mail was a clerk order schedule oral argument [974840-1]. (mam) [06-5126]
10/16/06	FIRST CLASS MAIL [1003448-1] sent to Susan Burke RETURNED marked "unclaimed". Mail was an order granting appellants' motion to extend time to file reply brief. (mam) [06-5126]
10/20/06	LETTER filed by Appellant Francis J. Harvey, Appellant William H. Brandenburg, Appellant Timothy Houser pursuant to FRAP 28j advising of additional authorities [999292-1]. Certi-

DATE	PROCEEDINGS
	ficate of service date 10/20/06. (cwc) [06-5126]
10/20/06	MOTION (styled emergency motion for injunctive relief filed (5 copies) by appellants Munaf et al., in 06-5324, by their counsel, who is counsel for Appellee Sandra K. Omar et al. in this case (certificate of service by mail dated 10/20/06) for injunction pending appeal [999448-1]. Note: the moion contains a request that this motion be decided by panel who heard oral argument in 06-5126. (filed 10/20/06 in 06-5324, ID 999233) (mam) [06-5126]
10/23/06	PER CURIAM ORDER filed [999547] denying request to assn appeal to panel who heard oral argument in 06-5126 (Judge Tatel, Judge Brown and Judge Edwards) and referring consideration of motion injunction [999233-1] to a special panel. [Entry Date: 10/23/06] [06-5126, 06-5324] (mam) [06-5126 06-5324]
10/24/06	TRANSCRIPT of oral argument held on 9/11/06. [965562-1] (mam) [06-5126]

DATE	PROCEEDINGS
11/8/06	FIRST CLASS MAIL [1003449-1] RESENT to Ms. Burke: copies of 5/10/06 order, 6/19/06 order and 7/11/06 order sent to her for her records. (mam) [06-5126]
2/9/07	JUDGMENT that the decision of the district court is affirmed for the reasons in the accompanying opinion. Before Judges Tatel, Brown, Edwards. [Entry Date: 2/9/07] (mcm) [06-5126]
2/9/07	OPINION filed [1022184] (25 pgs) for the Court by Judge Tatel, DISSENTING OPINION (12 pgs) filed by Judge Brown (mcm) [06-5126]
2/9/07	CLERK'S ORDER filed [1022185] The Clerk is directed to withhold issuance of the mandate [1022185-1] pending disposition of any timely petition for rehearing. [Entry Date: 2/9/07] (mcm) [06-5126]
3/26/07	PETITION for rehearing [1031273-1] and PETITION, for rehearing en banc [1031273-2] (20 copies) filed by Appellant Francis J. Harvey (c/s dated 3/26/07) (mam) [06-5126]

DATE	PROCEEDINGS
4/4/07	CLERK'S ORDER filed [1032953], on the court's own motion, that within 15 days of the date of this order, appellees file a response to the petition, not to exceed 15 pages. the [*sic*] court will not accept a reply to the response. [Entry Date: 4/4/07] (mcm) [06-5126]
4/18/07	RESPONSE filed [1035660-1] (5 copies) by Appellees Sandra K. Omar and Ahmed S. Omar (certificate of service dated 4/18/07) to Appellants' Petition for Rehearing and Rehearing En Banc. (smc) [06-5126]
4/19/07	CORRECTED response to Appellants' Petition for Rehearing and Rehearing En Banc [1035805-1] (certificate of service dated 4/19/07) [1035660-1] filed by Appellees Sandra K. Omar and Ahmed S. Omar. (smc) [06-5126]
4/26/07	LETTER filed by Appellant Francis J. Harvey pursuant to FRAP 28j advising of additional authorities [1036894-1]. Certificate of service date 4/26/07. (mam) [06-5126]
5/24/07	PER CURIAM ORDER, In Banc, filed [1042558] denying suggestion rehearing en banc [1031273-2] filed by Francis Harvey. Before Judges Ginsburg,

DATE	PROCEEDINGS
	Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown,* Griffith, Kavanaugh.* [Entry Date: 5/24/07] (Circuit Judges Brown and Kavanaugh would grant the petition for rehearing en banc) (mcm) [06-5126]
5/24/07	PER CURIAM ORDER filed [1042559] denying petition rehearing [1031273-1] filed by Francis J. Harvey. (Mandate may issue on or after 6/1/07). Before Judges Tatel, Brown,* Edwards. [Entry Date: 5/24/07] (Circuit Judge Brown would grant the petition for rehearing) (mcm) [06-5126]
6/15/07	MANDATE ISSUED to Clerk, District Court [1047306-1] (mcm) [06-5126]
8/17/07	NOTICE filed by the Supreme Court. The application for an extension of time within which to file a petition for a writ of certiorari has been presented to The Chief Justice, who on 8/15/07 extended the time to and including 9/21/07 (appl no. 07A117) [1061412-1] (smc) [06-5126]
12/10/07	LETTER sent by the S. Ct. on 12/7/07 stating that they entered an order granting the petition for a writ of certiorari. The case is consolidated with 06-1666 and a total of one hour is allotted

DATE	PROCEEDINGS
	for oral argument. [1086023-1] (hts) [06-5126]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

No. 1:05-cv-02374-RMU

SANDRA K. OMAR, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/12/2005	1	PETITION for Writ of Habeas Corpus (Filing fee $ 5.) filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2 # 3 Exhibit 3-15 # 4 Exhibit List # 5 Text of Proposed Order # 6 Certificate of Service) (jf,) (Entered: 12/13/2005)
01/19/2006	2	ENTERED IN ERROR .....MOTION for Order to Show Cause by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Brief in Support of Motion # 2 Text

DATE	DOCKET NUMBER	PROCEEDINGS
		of Proposed Order # 3 Certificate of Service) (Burke, Susan) Modified on 1/19/2006 (tg,). (Entered: 01/19/2006)
01/19/2006	3	MOTION for Order to Show Cause by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Brief in Support of Motion # 2 Text of Proposed Order # 3 Certificate of Service) (Burke, Susan) (Entered: 01/19/2006)
01/19/2006		NOTICE OF CORRECTED DOCKET ENTRY: re 2 MOTION for Order to Show Cause was entered in error as the memorandum of points and authorities was filed instead of the motion. Counsel was instructed to refile said pleading. (tg,) (Entered: 01/19/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
01/20/2006	4	ORDER granting 3 Motion for Order to Show Cause. Signed by Judge Ricardo M. Urbina on 1/20/06. (md) (Entered: 01/20/2006)
01/24/2006	5	Unopposed MOTION for Extension of Time to *Show Cause Why Writ Should Not Be Granted* by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. (Attachments: # 1 Text of Proposed Order) (White, Edward) (Entered: 01/24/2006)
01/25/2006		MINUTE ORDER granting 5 Consent Motion for Extension of Time. The respondents shall respond to the show cause order on or before February 9, 2006. Signed by Judge Ricardo M. Urbina on 1/25/06. (md) (Entered: 01/25/2006)
01/25/2006		Set Deadlines/Hearings: Respondent's Response to Show Cause due by 2/9/2006. (jwd) (Entered: 01/25/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
02/03/2006	9	ORDER Granting Ex Parte Motion for Temporary Restraining Order. It is hereby ORDERED that the petitioner's motion for a temporary restraining order is GRANTED. It is FURTHER ORDERED that the petitioner shall not be removed from United States custody, and it is ORDERED that the temporary restraining order expires on Monday, February 13, 2006, and it is FURTHER ORDERED that the petitioners shall submit supplemental briefing on or before Monday, February 6, 2006 at 9 a.m., and it is ORDERED that the respondents shall submit an opposition to the petitioner's motion on or before Tuesday, February 7, 2006 at 5 p.m., and it is FURTHER ORDERED that the petitioner shall submit a reply to the government's opposition on or before Wednesday, February 8, 2006 at

DATE	DOCKET NUMBER	PROCEEDINGS
		3 p.m. Signed by Judge Ricardo M. Urbina on 2/3/06. (md) (Entered: 02/03/2006)
02/03/2006		MINUTE ORDER: The petitioners shall file the original ex parte motion for a temporary restraining order electronically. Signed by Judge Ricardo M. Urbina on 2/3/06. (md) (Entered: 02/03/2006)
02/03/2006	7	MOTION for Temporary Restraining Order by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit A # 2 Exhibit 1# 3 Exhibit 2 # 4 Exhibit B) (tg,) (Entered: 02/03/2006)
02/03/2006	8	Emergency MOTION for Temporary Restraining Order by SANDRA K. OMAR, AHMED S. OMAR. (Burke, Susan) (Entered: 02/03/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
02/03/2006		Set Deadlines/Hearings: Petitioners supplemental briefing due by 2/6/2006 at 9:00 a.m. Respondents Opposition due by 2/7/2006 at 5:00 p.m. Petitioners Reply to Government's Opposition due by 2/8/2006 at 3:00 p.m. (jwd) (Entered: 02/03/2006)
02/06/2006	10	SUPPLEMENTAL MEMORANDUM to re 8 Emergency MOTION for Temporary Restraining Order filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit A # 2 Exhibit B-E) (Burke, Susan) (Entered: 02/06/2006)
02/06/2006	11	MEMORANDUM OPINION. Signed by Judge Ricardo M. Urbina on 2/6/06. (md) (Entered: 02/06/2006)
02/07/2006	12	RESPONSE TO ORDER OF THE COURT re 9 Order,,, *Respondents' Opposition to Petitioners' Ex Parte Motion for a Temporary Restraining Order* filed by FRANCIS J. HARVEY,

DATE	DOCKET NUMBER	PROCEEDINGS
		WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. (Attachments: # 1 Exhibit 1# 2 Exhibit 2 # 3 Exhibit 3 # 4 Exhibit 4 # 5 Exhibit 5) (White, Edward) (Entered: 02/07/2006)
02/07/2006	13	MOTION for Leave to Appear Pro Hac Vice: Attorney Name- Heather L. Allred.: Address- Burke Pyle LLC, 3527 Lancaster Avenue, Philadelphia, PA 19104. Phone No. - (215) 387-4705. Fax No. - (215) 387-4713 by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit Declaration of Heather L. Allred # 2 Text of Proposed Order) (Burke, Susan) (Entered: 02/07/2006)
02/07/2006	14	MOTION for Leave to Appear Pro Hac Vice: Attorney Name- Aziz Z. Huq.: Address- Brennan Center for Justice at NYU School of Law, 12th Floor, 161 Avenue of the Americas, New York,

DATE	DOCKET NUMBER	PROCEEDINGS
		NY 10013. Phone No. - (212) 992-8632. Fax No. - (212) 995-4550 by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit Declaration of Aziz Z. Huq # 2 Text of Proposed Order) (Burke, Susan) (Entered: 02/07/2006
02/07/2006	15	MOTION for Leave to Appear Pro Hac Vice: Attorney Name- Jonathan Hafetz.: Address- Brennan Center for Justice at NYU School of Law, 12th Floor, 161 Avenue of the Americas, New York, NY 10013. Phone No. - (212) 998-6730. Fax No. - (212) 995-4500 by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit Declaration of Jonathan Hafetz # 2 Text of Proposed Order) (Burke, Susan) (Entered: 02/07/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
02/08/2006		MINUTE ORDER granting 13 14 15 motions for leave to appear pro hac vice. Heather H. Allred, Aziz Z. Huq and Jonathan Hafetz are hereby granted leave to appear pro hac vice. Signed by Judge Ricardo M. Urbina on 2/8/06. (Entered: 02/08/2006)
02/08/2006	16	MOTION for Leave to Appear Pro Hac Vice: Attorney Name- Joseph Margulies.: Address- MacArthur Justice Center, University of Chicago Law School, 1111 East 60th Street, Chicago, IL 60637. Phone No. - (773) 702-9560. Fax No. - (773) 702-0771 by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit Declaration of Joseph Margulies # 2 Text of Proposed Order) (Burke, Susan) (Entered: 02/08/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
02/08/2006	17	ENTERED IN ERROR..... REPLY to opposition to motion re 8 Emergency MOTION for Temporary Restraining Order filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit 1 # 2 Exhibit 2) (Burke, Susan) Modified on 2/8/2006 (tg,). (Entered: 02/08/2006)
02/08/2006		NOTICE OF CORRECTED DOCKET ENTRY: re 17 Reply to opposition to Motion was entered in error at counsel's request due to typographical errors. Counsel will refile said pleading. (tg,) (Entered: 02/08/2006)
02/08/2006	18	REPLY to opposition to motion re 8 Emergency MOTION for Temporary Restraining Order filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Exhibit 1# 2 Exhibit 2) (Burke, Susan) (Entered: 02/08/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
02/09/2006		MINUTE ORDER granting 16 Motion for Leave to Appear Pro Hac Vice. Joseph Margulies is hereby granted leave to appear pro hac vice. Signed by Judge Ricardo M. Urbina on 2/9/06. (Entered: 02/09/2006)
02/09/2006	19	AFFIDAVIT re 10 Supplemental Memorandum *Signed Declaration of Hania Mufti* by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Affidavit) (Burke, Susan) (Entered: 02/09/2006)
02/09/2006	20	RESPONSE TO ORDER OF THE COURT re Order on Motion for Extension of Time to, 4 Order on Motion for Order to Show Cause *Respondents' Response to Order to Show Cause Supporting Dismissal of the Petition for Habeas Corpus* filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOU-

DATE	DOCKET NUMBER	PROCEEDINGS
		SER. (White, Edward) (Entered: 02/09/2006)
02/13/2006	21	ORDER Granting the Petitioner's Motion for a TRO/ Preliminary Injunction. Signed by Judge Ricardo M. Urbina on 2/13/06. (Entered: 02/13/2006)
02/13/2006	22	MEMORANDUM OPINION. Signed by Judge Ricardo M. Urbina on 2/13/06. (Entered: 02/13/2006)
02/16/2006	23	REPLY to opposition to motion re 3 MOTION for Order to Show Cause *Memorandum and Proposed Order Concerning Conference and Discovery Order* filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Text of Proposed Order) (Burke, Susan) (Entered: 02/16/2006)

DATE	DOCKET NUMBER	PROCEEDINGS
03/02/2006	24	RESPONSE to 23 *Petitioners' Memorandum and Proposed Order Concerning Conference and Discovery Order* filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. (White, Edward) Modified on 3/3/2006 (nmw,). (Entered: 03/02/2006
03/09/2006	25	REPLY re 24 *to Response to Memorandum Concerning Conference and Discovery Order* filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Text of Proposed Order) (Burke, Susan) Modified on 3/10/2006 (nmw,). (Entered: 03/09/2006)
03/29/2006	26	SUPPLEMENTAL MEMORANDUM to re 25 Reply to Document *Request for Ruling on Conceded Motion for Access to Counsel* filed by SANDRA K. OMAR,

DATE	DOCKET NUMBER	PROCEEDINGS
		AHMED S. OMAR. (Burke, Susan) (Entered: 03/29/2006)
03/30/2006	27	RESPONSE to 26 *Petitioners' Request for Ruling* filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. (White, Edward) Modified on 3/31/2006 (nmw,). (Entered: 03/30/ 2006)
04/14/2006	28	NOTICE OF APPEAL as to 21 Order entered on 02/13/06 by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. No fee/U.S. Government. (jf,) (Entered: 04/17/ 2006)
04/14/2006		Supplemental Record on Appeal transmitted to US Court of Appeals re 28 Notice of Appeal (jf,) (Entered: 04/17/ 2006)

DATE	DOCKET NUMBER	PROCEEDINGS
04/21/2006	29	Emergency MOTION Renewed Request for Access and Motion for Records by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Text of Proposed Order # 2 Exhibit A # 3 Exhibit B # 4 Exhibit C # 5 Exhibit D # 6 Exhibit E # 7 Exhibit F) (Burke, Susan) (Entered: 04/21/2006)
05/05/2006	30	Memorandum in opposition to re 29 Emergency MOTION Renewed Request for Access and Motion for Records filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. (Attachments: # 1 Exhibit A # 2 Exhibit B) (White, Edward) (Entered: 05/05/2006)
05/17/2006	31	REPLY to opposition to motion re 29 Emergency MOTION Renewed Request for Access and Motion for Records filed by SANDRA K. OMAR, AHMED S. OMAR. (Attachments: # 1 Text of

DATE	DOCKET NUMBER	PROCEEDINGS
		Proposed Order) (Burke, Susan) (Entered: 05/17/2006)
05/17/2006		USCA Case Number 06-5126 for 28 Notice of Appeal filed by FRANCIS J. HARVEY, WILLIAM H. BRANDENBURG, TIMOTHY HOUSER. (jf,) (Entered: 05/18/2006)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. [Omitted]

SANDRA K. OMAR, [**REDACTED**]

ADHMED S. OMAR, [**REDACTED**] AS NEXT FRIENDS OF SHAWQI AHMAD OMAR, CAMP BUCCA, IRAQ;
PETITIONERS

v.

FRANCIS J. HARVEY, SECRETARY OF THE UNITED STATES ARMY, 101 ARMY PENTAGON, ROOM 3E-506, WASHINGTON, D.C. 20301-0101;

MAJOR GENERAL WILLIAM H. BRANDENBURG, DEPUTY COMMANDING GENERAL (DETAINEE OPERATIONS)/COMMANDING GENERAL, TASK FORCE 134, MULTI-NATIONAL FORCE-IRAQ; LIEUTENANT COLONEL TIMOTHY HOUSER, 105TH MILITARY POLICE BATTALION, CAMP BUCCA, IRAQ 09375;
RESPONDENTS

PETITION FOR WRIT OF HABEAS CORPUS

I. INTRODUCTORY STATEMENT

1. Petitioners Sandra K. Omar ("Sandra") and Ahmed S. Omar ("Ahmed") seek a writ of habeas corpus on behalf of and as next friends of Shawqi Ahmad Omar ("Shawqi" or "Mr. Omar"). Sandra is Shawqi's wife and Ahmed is Shawqi's adult son.

They are among Mr. Omar's closest living relatives.

2. Mr. Omar is a United States citizen who has been illegally imprisoned by the United States military in Iraq for more than one year. He has been detained virtually *incommunicado*, without notice, without access to counsel, without charge, without warrant, and without even elementary due process. He has repeatedly asserted his innocence and requested legal counsel. Because these requests have been unavailing, his wife and son, both United States citizens, petition this Court for a writ of habeas corpus on Mr. Omar's behalf.

3. On information and belief, Mr. Omar was living in Baghdad, Iraq with his ten-year-old-son when he was arrested at his home on October 29, 2004. After more than twelve months of detention, Mr. Omar continues to be held in United States detention at Camp Bucca, in southern Iraq. Mr. Omar's family members have not received any information from his captors about the duration or legal basis for his detention, despite their repeated requests.

4. The United States Constitution, the laws of the United States, and the binding obligations of international law all prohibit the United States from arresting its citizens and denying them access to counsel and to any legal process by which they may challenge the basis of their detention. Mr. Omar's continued detention, now more than one year's duration, violates numerous constitutional, statutory, and international law provisions, including:

a) The fundamental right to due process of law guaranteed by the Fifth Amendment of the United States Constitution;

b) The fundamental right to be released absent a criminal proceeding or judicial process under the Suspension Clause of the United States Constitution, Article I, § 9, cl. 2;

c) The fundamental right to assistance of counsel protected by the Fifth and Sixth Amendments;

d) The right to be free from arbitrary and indefinite executive detention pursuant to the Citizen Non-Detention Act, 18 U.S.C. § 4001(a); and

e) The right to be free from arbitrary and indefinite detention as guaranteed under, *inter alia*, the International Convention on Civil and Political Rights and customary international law, including the customary international law of armed conflict.

5. Accordingly, Petitioners Sandra and Ahmed Omar respectfully seek relief from this Court in the form of a writ of habeas corpus. Petitioners specifically request that this Court issue such a writ compelling Respondents to give Mr. Omar access to counsel, and either to release Mr. Omar or to provide a lawful basis for his continued detention.

II. JURISDICTION AND VENUE

6. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. §§ 2241(a), (c)(1) & (c)(3); 2242 and 2243. In addition, this Court has jurisdiction under

the United States Constitution, Article I, § 9, cl. 2 (the Suspension Clause), Article III, and the Due Process Clause of the Fifth Amendment because those provisions entitle Petitioners to a judicial forum in which to contest the legal validity of Mr. Omar's detention. Petitioners further invoke this Court's jurisdiction under 28 U.S.C. §§ 1331, 1350, 1651 (the All Writs Act), §§ 2201 & 2202 (the Declaratory Judgment Act).

6. Mr. Omar is legally entitled to challenge his detention. The United States Supreme Court recently held that federal habeas corpus jurisdiction "requires nothing more" than a claim that a petitioner is "being held in federal custody in violation of the laws of the United States" once personal jurisdiction over a custodian is established. *Rasul* v. *Bush*, 543 U.S. 466, ___, 124 S. Ct. 2688, 2698 (2004).

7. Camp Bucca is within the plenary and exclusive "jurisdiction or dominion exercised in fact" of the United States, such that this Court has jurisdiction over a claim brought by an American citizen imprisoned there. *Id.* at 2697.

8. This Court has personal jurisdiction over Respondents because they are officers or agents of the United States carrying out their responsibilities in the District of Columbia, having substantial contacts in the District, and being physically located within this Court's territorial jurisdiction.

9. Venue is proper in the District of Columbia for this writ of habeas corpus because one or more of the Respondents resides within the jurisdiction of this

Court and is amendable to service of process in the district. 28 U.S.C. §§ 1391(a), (b) & (e).

III. PARTIES

10. Petitioner Sandra K. Omar ("Sandra") is Shawqi Omar's wife and an American citizen who currently resides in Amman, Jordan. Her declaration is attached as Exhibit 1. Sandra has repeatedly sought information about and access to her husband since his arrest. *Exhibit 1 (Sandra Omar Decl.) at ¶¶ 11-15; 21-23; 25; 29.* United States military authorities have failed to provide Sandra with any reason for Mr. Omar's continued detention. Because Mr. Omar has been denied access to legal counsel and to the courts of the United States, Sandra acts as his next friend. *See id. at ¶¶ 19; 26-28.*

11. Petitioner Ahmed Omar ("Ahmed") is Mr. Omar's eldest son, and an American-born United States citizen who resides in North Carolina. His declaration is attached as Exhibit 2. Ahmed has been deeply concerned about his father's health and safety since the beginning of Mr. Omar's detention, and has been one of a handful of close relations who has received correspondence from Mr. Omar, and who has attempted to correspond with Mr. Omar. *See Exhibits 6-9; 15 (correspondence from Shawqi Omar to Ahmed Omar).* Because Mr. Omar has been denied access to counsel and to the courts of the United States, Ahmed acts as his next friend.

12. Petitioner Shawqi Omar is a naturalized citizen of the United States of America. His United States Passport number is **[REDACTED]**. *See Exhibit 3 (copy of passport).* His naturalization number is

[REDACTED]. *See Exhibit 4 (copy of naturalization certificate).* He is incarcerated in United States military custody at Camp Bucca Theater Internment Facility in the vicinity of Umm Qasr, in southern Iraq. On information and belief, his detainee number at Camp Buccas is 200165. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 16.* Mr. Omar has requested that his captors provide him with counsel, but to date has been denied access to counsel, despite having invoked his right to counsel several times in letters to his family. *See infra at ¶ 29 (describing Mr. Omar's repeated attempts to obtain counsel).*

13. Petitioners Ahmed and Sandra Omar are dedicated to representing the interests of Shawqi Omar, with whom they share a close, familial relationship. By contrast, Mr. Omar cannot review, sign, or approve this Petition or appear in his own behalf because he remains in almost *incommunicado* confinement at Camp Bucca, Iraq. Moreover, Mr. Omar lacks access to an attorney or to United States courts, despite his repeated requests for counsel. Denied all access to the United States Consular Service and provided only intermittent contact with representatives of the International Committee of the Red Cross ("ICRC"), Mr. Omar's sole contact with the outside world is via sporadic telephone calls (six over the course of a year) and heavily censored hand-written correspondence to his family in communications that are restricted by the military authorities to "family news only." In short, Mr. Omar is completely incapable of acting on his own behalf. Accordingly, Ahmed and Sandra Omar, his son and wife respectively, file suit on his behalf.

14. Respondent Francis J. Harvey is the Secretary of the United States Army. Respondent Harvey is the senior official of the Department of the Army and is responsible for all matters related to the United States Army. Respondent Harvey has authority over the custody and control of United States Armed Forces detainee operations in Iraq, including those held at Camp Bucca and the custodian responsible for Mr. Omar's detention. He is sued in his official capacity.

15. Respondent Major General William H. Brandenburg is Deputy Commanding General of Detainee Operations and Commanding General of Task Force 134, Multi-National Force-Iraq. Respondent Brandenburg has responsibility for detainee operations for United States Armed Forces in Iraq. Respondent Brandenburg is charged with maintaining custody and control over all of the approximately 11,000 prisoners of the United States Army in Iraq, including those at Camp Bucca. He is sued in his official capacity.

16. Respondent Lieutenant Colonel Timothy Houser is with the 105th Military Police Battalion and is the commanding officer at Camp Bucca, Iraq. Respondent Houser is Shawqi's immediate custodian at Camp Bucca.

IV. STATEMENT OF FACTS

A. Background to Mr. Omar's Arrest

17. Shawqi Omar is an American citizen. Born to Jordanian parents in Kuwait on December 17, 1961, Mr. Omar came to the United States on a student visa in 1979 at age seventeen. *See Exhibit 1 (San-*

dra Omar Decl.) at ¶ 4. In 1983, he married a United States citizen, Sandra Kay Sulzle (now Sandra Omar), in Mobridge, South Dakota. *See id. at ¶ 3.* With his new wife, Mr. Omar moved to Minnesota, where he served in the Minnesota National Guard. *Id.* He became a United States citizen on November 17, 1986. See Exhibit 4. He and Sandra have six children together, all of whom are United States citizens. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 7.*

18. At some point following the removal of the Saddam Hussein dictatorship, Mr. Omar traveled to Iraq with his ten-year-old son, Salahedin, seeking contract work in the reconstruction of that country. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 9.* On information and belief, he intended to return to the United Arab Emirates, where Petitioner Sandra Omar was living at the time, in time for the Eid holiday in November 2004.

B. Mr. Omar's Arrest and Detention

19. United States soldiers arrested Mr. Omar in front of his ten-year-old son at his Baghdad residence on October 29, 2004. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 11.* Mr. Omar was beaten by soldiers in front of family members during the course of the arrest. *Id.*

20. Since October 29, 2004, Mr. Omar has been held by United States Armed Forces in Iraq, while his family has received no formal notification of the grounds for his detention. *See Exhibit 2 (Ahmed Omar Decl.) at ¶ 8.* Mr. Omar was initially held at Camp Cropper, which is close to Baghdad Interna-

tional Airport, and is currently being held at Camp Bucca, near Umm Qasr. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 16; Exhibit 5 (May 19, 2005 letter from Amman ICRC).*

C. Petitioner's Attempts To Contact Mr. Omar

21. On or about November 10, 2004, Sandra Omar learned from family that her husband had been arrested. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 11.* At that time, Sandra was also advised that the same United States forces had confiscated her son Salahedin's United States passport. After much difficulty, the ICRC was able to secure Shawqi's signature on the form needed to retrieve Salahedin's passport. Sandra received the passport in May 2005, over six months after it had been confiscated. *Id.* at ¶ *22.*

22. Sandra contacted the American Embassy in Baghdad, Iraq, seeking information about her husband's whereabouts and the reasons for his detention. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 11.* On December 22, 2004, Marie Damour, United States Consul in Baghdad, informed Sandra that Mr. Omar was being held "under United States military care, custody, and control," and that he had recently been seen by the ICRC. *See id. at ¶ 13.*

23. Sandra Omar communicated with Ms. Damour several times (via electronic mail and telephone) between December 6, 2004 and April 4, 2005. On February 16, 2005, almost four months after Shawqi Omar was first arrested and imprisoned by United States Armed Forces in Iraq, Ms. Damour informed Sandra that the United States military

had denied the United States Consular Service's request to meet with Shawqi. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 15.*

24. On January 12, 2005, Ms. Damour informed Sandra Omar by email that she had received verbal agreement from the detaining authority to visit Mr. Omar. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 14.* Three months later, however, Ms. Damour was still in the process of trying to secure permission from the United States military to see Mr. Omar. On April 4, 2005, she emailed Sandra and stated that the United States Armed Forces had denied the United States Consul visitation permission. Describing her efforts, Ms. Damour stated that she was "afraid that we have been stymied at every turn." *Id. at ¶ 15.*

25. On October 27, 2005, Mr. Omar was transferred temporarily to Abu Ghraib prison near Baghdad, where he was visited by United States consular personnel. He was not given access to a lawyer at this time. His family was not informed in advance of the visit. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 24.*

26. Mr. Omar has been permitted to correspond with his family only via handwritten letters and via six brief telephone calls to his wife Sandra and other family members. Written correspondence is transmitted through the ICRC. Many of Shawqi Omar's letters to his relatives, which the military authorities limit to "family news only," contain redacted or blacked-out text. *See, e.g., Exhibit 6 (April 29, 2005 letter from Shawqi Omar to Ahmed Omar.)*

27. Mr. Omar has been subjected to days of interrogation without a lawyer present against his express requests. Mr. Omar stated that he had "requested [a lawyer] the first min[ute] [he] was arrested." *Exhibit 7 (March 18, 2005 letter from Shawqi Omar to Ahmed Omar).* In a March 11, 2005 letter, Mr. Omar has stated that he has been questioned "for 8 days with no lawyer" even though "I asked them to get me a lawyer over here." *Exhibit 8 (March 11, 2005 letter from Shawqi Omar to Ahmed Omar).*

28. Not all the correspondence from Mr. Omar's family reaches him in Camp Cropper and Camp Bucca. In a February 11, 2005 letter addressed to Ahmed, Mr. Omar asserted that he had not received any letters from family members. *See Exhibit 9 (February 11, 2005 letter from Shawqi Omar to Ahmed Omar).* On May 20, 2005, Shawqi indicated that he had only received eleven letters from his family during the previous seven months. *See Exhibit 10 (May 20, 2005 letter from Shawqi Omar to Sandra Omar).*

D. Requests for Counsel and Assertions of Innocence

29. Mr. Omar has requested counsel on at least seven occasions, as evidenced by correspondence with his family. *See Exhibit 13 (March 18, 2005, letter from Shawqi Omar to Sandra Omar) (stating that "my only Demand is to see a Lawyer" and that Mr. Omar had been requesting a lawyer "for the last 5 months, But nothing"); id. ("[M]y only Demand is to see a Lawyer"); see also Exhibit 7 (March 18, 2005 letter from Shawqi Omar to Ahmed Omar) ("I have to have a lawyer ASAP.") Exhibit 8 (March*

11, 2005 letter from Shawqi Omar to Ahmed Omar) ("You need to find a lawyer to take my case in the States"); Exhibit 9 (February 11, 2005 letter from Shawqi Omar to Ahmed Omar) (requesting Ahmed to find "any one willing to be my lawyer in here"); Exhibit 6 (April 29, 2005 letter from Shawqi Omar to Ahmed Omar) (asking Ahmed "to sue everyone and contact every newspaper"); Exhibit 11 (May 6, 2005, letter from Shawqi Omar to Sandra Omar) (noting that he "didn't see any lawyer"); Exhibit 12 (April 22, 2005, letter from Shawqi Omar to Sandra Omar) ("I need a lawyer for my case in the USA, I have not seen any lawyer").

30. Mr. Omar expressed the gravity of his request for counsel in the form of a hunger strike, telling his captors that he would not eat until he got a lawyer. He wrote to Ahmed that he would take "No food, water, Medicine, until I see a lawyer." *Exhibit 7 (March 18, 2005 letter from Shawqi Omar to Ahmed Omar).*

31. Mr. Omar also continually asserted that he is innocent of wrongdoing. In a May 20, 2005 letter to his wife, for example, he emphatically insisted that "I did not do anything wrong." *Exhibit 10 (transcript of May 20, 2005, letter from Shawqi Omar to Sandra Omar).*

E. Conditions of Mr. Omar's Confinement

32. Mr. Omar has only sporadic visits from the ICRC, which monitors detention conditions and prisoners' well-being in Iraq. In a letter dated February 11, 2005, Mr. Omar indicated he had had no contact with the ICRC for more than two months. *See Ex-*

hibit 9 (February 11, 2005 letter from Shawqi Omar to Ahmed Omar).

33. Give the intermittent and fragmentary communications from Mr. Omar, Petitioners Sandra and Ahmed are deeply concerned about Mr. Omar's physical and psychological well being after more than twelve months of detention by the United States military in Iraq. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 29; Exhibit 2 (Ahmed Omar Decl.) at ¶ 10.*

34. Mr. Omar has explained that he had been on a hunger strike taking only liquids: "[O]n the 17th off [sic] March 2005, I started a full strike where I will not take anything. No food, No liquid, No medicine, No IV." *Exhibit 13 (March 18, 2005, letter from Shawqi Omar to Sandra Omar).* The same day, Mr. Omar wrote to his son that he would remain on a "full strike[.] No food, water, Medicine, until I see a lawyer." *Exhibit 7 (March 18, 2005 letter from Shawqi Omar to Ahmed Omar).*

35. Mr. Omar has been held in solitary confinement, his health is deteriorating, and he has lost a substantial amount of weight. *See, e.g., Exhibit 14 (July 22, 2005 letter from Shawqi Omar to Sandra Omar) (Mr. Omar is in solitary confinement); Exhibit 8 (March 11, 2005 letter from Shawqi Omar to Ahmed Omar); Exhibit 9 (February 11, 2005 letter from Shawqi Omar to Ahmed Omar); Exhibit 15, (January 6, 2005 letter from Shawqi Omar to Ahmed Omar). In a further letter dated July 22, 2005, Shawqi wrote that he is "in solitary in Bucca [and] my health is not good . . . ." Exhibit 14 (true transcript of July 22, 2005 letter*

from Shawqi Omar to Sandra Omar). Four months earlier, he had stated that he had "already lost 60 lbs." Exhibit 7 (March 18, 2005 letter from Shawqi Omar to Ahmed Omar); see also Exhibit 11 (May 6, 2005, letter from Shauqi Omar to Sandra Omar) (noting that Mr. Omar had lost 35 lbs.).

F. Fear of Unlawful Transfer

36. Petitioners Sandra and Ahmed have reason to believe that the United States military may turn Mr. Omar over to the custody of Iraqi authorities in an effort to evade the strictures of United States law. On or about June 22, 2005, Mr. Omar was allowed a brief opportunity to speak by telephone with his wife. During that conversation, Mr. Omar told her that he had been told that he may be transferred to the custody of Iraqi authorities. *See Exhibit 1 (Sandra Omar Decl.) at ¶¶ 17, 18.*

37. On November 1, 2005, Petitioner Sandra was informed by email by the United States Consul that "under Iraqi law, [Mr. Omar] has a right to legal counsel should he appear before an investigating judge on criminal charges." Petitioner Sandra believes this refers to a potential transfer to Iraqi custody. *See Exhibit 1 (Sandra Omar Decl.) at ¶ 25.*

38. Petitioners Sandra and Ahmed, who are Shawqi's closest family members, know Mr. Omar wishes them to proceed via a habeas corpus petition to secure his release.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF
UNLAWFUL DETENTION UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

39. Petitioners reallege and incorporate by reference each and every allegation contained in the proceeding paragraphs as if set forth fully herein.

40. Respondents' arrest and arbitrary, indefinite detention without process of Mr. Omar violates the "most elementary of liberty interests—the interest in being free from physical detention by one's own government." *Hamdi v. Rumsfeld*, 542 U.S. 507, ____, 124 S. Ct. 2633, 2646 (2004) (O'Connor, J., plurality op.). The United States Constitution affords Shawqi Omar, as a United States citizen, its full protection.

41. The United States' detention of Mr. Omar is arbitrary and unlawful in at least two respects. First, Mr. Omar has not been afforded access to counsel or any adequate procedure or an opportunity to be heard or notice to permit him to show his innocence of any and all wrongdoing. The Due Process Clause of the Fifth Amendment to the Constitution guarantees Mr. Omar the right to adequate notice of the basis for his detention and a meaningful opportunity to be heard to challenge his detention. Because Mr. Omar has been denied notice and any opportunity to be heard, his detention violates procedural due process.

42. Second, the United States has not charged Mr. Omar with a crime or otherwise articulated the grounds for Mr. Omar's detention. The unjustified detention of a person without a trial is a violation of substantive Due Process rights.

SECOND CLAIM FOR RELIEF
UNLAWFUL DETENTION UNDER THE SUSPENSION CLAUSE

43. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

44. Respondents' arrest and continued detention of Mr. Omar violates the United States Constitution, Habeas Corpus Suspension Clause, Article I, § 9, cl. 2, because the Suspension Clause guarantees Mr. Omar the right to be charged criminally or released. Mr. Omar has been and continues to be detained without charge.

45. Respondents' arrest and continued detention of Mr. Omar violates the Habeas Corpus Suspension Clause, Art. I, § 9, cl. 2, because the Suspension Clause guarantees Mr. Omar the right to an adequate and meaningful judicial process. Mr. Omar has been and continues to be detained without such a process.

THIRD CLAIM FOR RELIEF
UNLAWFUL DETENTION CONTRARY TO THE CITIZEN NON-DETENTION ACT

46. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

47. Respondents' arrest and detention of Mr. Omar violates the Citizen Non-Detention Act, 18 U.S.C. § 4001(a). The Act commands that: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." No Act of Congress authorizes the continued detention of Mr. Omar, and therefore his continued detention violates the Citizen Non-Detention Act.

FOURTH CLAIM FOR RELIEF
UNLAWFUL DETENTION CONTRARY TO ARMY REGULATIONS

48. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

49. Respondents' arrest and detention of Mr. Omar violates Army Regulation 190-8, which prohibits the prolonged detention of civilians. *See* Army Reg. 190-8 at 1-6(g) ("Persons who have been determined by a competent tribunal not to be entitled to prisoner of war status may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty should be imposed.")

FIFTH CLAIM FOR RELIEF
PROLONGED ARBITRARY DETENTION IN VIOLATION OF INTERNATIONAL LAW

50. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

51. Respondents have breached, and continue to breach their obligations under customary international law, accepted by and binding on the United States, by seizing and continuing to hold Mr. Omar, a United States citizen, without justification, charge, or judicial proceeding. International law, including the International Covenant on Civil and Political Rights and the customary international law of armed conflict, prohibits prolonged arbitrary detention.

SIXTH CLAIM FOR RELIEF
DENIAL OF ACCESS TO COUNSEL UNDER THE FIFTH AMENDMENT

52. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

53. Respondents have denied Mr. Omar any access to counsel, despite his repeated requests. This violates the Fifth Amendment to the Constitution of the United States, which prohibits the government from denying individuals in its custody access to counsel when they request it.

SEVENTH CLAIM FOR RELIEF
DENIAL OF ACCESS TO COUNSEL UNDER THE SIXTH AMENDMENT

54. Petitioners reallege and incorporate by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

55. Respondents have denied Mr. Omar any access to counsel, despite his repeated requests. Their conduct violates the Sixth Amendment to the Constitution, which grants Mr. Omar the right to be informed of the nature and cause of the accusation against him and to be provided the assistance of counsel in his defense.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray for relief as follows:

(a) Grant Petitioners Ahmed Omar and Sandra Omar "Next Friend" status for Shawqi Omar, the real party in interest in this Petition;

(b) Order Respondents to ensure that Real Party Shawqi Omar receives a copy of this Petition, and any Order this Court may issue;

(c) Order Respondents to allow counsel to meet and confer with Mr. Omar, in private and unmonitored attorney-client conversations, both by phone and in person;

(d) Order Respondents to cease all interrogations of Mr. Omar, whether direct or indirect;

(e) Enjoin Respondents from transferring Mr. Omar to the authority of any other government, sovereign, country, or agency until this Court has an opportunity to consider and decide the merits of this Petition;

(f) Issue a Writ of Habeas Corpus requiring Respondents to release Shawqi Omar from detention, and/or requiring Respondents to bring Shawqi Ahmad Omar before a court of competent jurisdiction in the United States to show just cause for his continued detention;

(g) Convene an evidentiary hearing and order Respondents to produce Shawqi for the hearing, either by video or in person; and

(h) Order such other relief as the Court may deem necessary and appropriate to protect Mr. Omar's rights, and his rights.

Dated: December 2, 2005

Respectfully submitted,

/s/ SUSAN L. BURKE

SUSAN L. BURKE
Susan L. Burke (D.C. Bar # 414939)
Heather L. Allred
BURKE PYLE LLC
3527 Lancaster Avenue
Philadelphia, PA 19104
Telephone: (215) 387-4705
Facsimile: (215) 387-4713

Joseph Margulies
MACARTHUR JUSTICE CENTER,
UNIVERSITY OF CHICAGO LAW SCHOOL
1111 East 60th Street
Chicago, IL 60637
Telephone: (773) 702-9560
Facsimile: (773) 702-0771

Aziz Z. Huq
Jonathan Hafetz
BRENNAN CENTER FOR JUSTICE,
NEW YORK UNIVERSITY LAW SCHOOL
161 Avenue of the Americas
12th Floor
New York, New York 10013
Telephone: (212) 998-6730
Facsimile: (212) 995-4550

Counsel for Petitioners

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-2374 (RMU)

SANDRA K. OMAR, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

[Filed: Feb. 3, 2006]

ORDER

Granting The *Ex Parte* Motion for a Temporary Restraining Order

Late in the evening on Thursday, February 2, 2006 the petitioner[1] filed an *ex parte* motion for a temporary restraining order. Upon consideration of the arguments in the motion and for reasons to be set forth more fully in a memorandum opinion to follow, the court grants the petitioner's motion for a temporary restraining order.

This order is entered without prior notice to the government because the *ex parte* motion raises obvious and substantial issues regarding the threat of irreparable harm to an American citizen. First, the petitioner alleges that he faces the possibility of transfer to the

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[1] Technically, there are three petitioners in this case, two of whom are next friends of Shawqi Ahmad Omar. Because Shawqi Ahmad Omar is the only petitioner allegedly subject to transfer to the Iraqi authorities, all references are to one petitioner.

control of a country where he may be subjected to torture or indefinitely confinement; and second, this court recognizes that the petitioner faces the threat of irreparable harm based on the potential elimination of his habeas claims. Pursuant to *CSX Transport, Inc. v. Williams*, the court concludes that, for purposes of a temporary restraining order, petitioner has made an adequate showing. *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005) (citing *CityFed Fin. Corp.*, 58 F.3d at 747) (stating that the four factors for a injunctive relief should be balanced on a sliding scale, and that a party can compensate for a lesser showing on one factor by making a very strong showing on another factor).

Affording the parties adequate time to address these and other operative issues more fully, the court elects to maintain the status quo during the pendency of the temporary restraining order now set in place for the next ten days.[2]

Accordingly, it is this 3rd day of February, 2006,

ORDERED that the motion for a temporary restraining order is **GRANTED**, and it is

FURTHER ORDERED that the petitioner shall not be removed from United States custody, and it is

ORDERED that the temporary restraining order expires on Monday, February 13, 2006, and it is

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[2] Because the court recognizes the tension created by the constitutional implications arising out of judicial versus executive branch authority on the matter, the court directs counsel to address this issue head on and through referenced authority in their submissions.

FURTHER ORDERED that the petitioners shall submit supplemental briefing on or before Monday, February 6, 2006 at 9 a.m., and it is

ORDERED that the respondents shall submit an opposition to the petitioner's motion on or before Tuesday, February 7, 2006 at 5 p.m., and it is

FURTHER ORDERED that the petitioner shall submit a reply to the government's opposition on or before Wednesday, February 8, 2006 at 3 p.m.

SO ORDERED.

RICARDO M. URBINA
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-2374 (RMU)

SANDRA K. OMAR, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

[Filed: Feb. 5, 2006]

DECLARATION OF SUSAN L. BURKE

I declare under penalty of perjury that the following is true and correct:

1. My name is Susan L. Burke. I have been a member of the bar of the District of Columbia since 1987. I practiced with Covington & Burling for fourteen years. I also served as a Trial Attorney in Civil Frauds, Department of Justice. I now have my own firm, Burke Pyle LLC, which, along with the McArthur Justice Center at University of Chicago Law Center and the Brennan Center for Justice at the New York University School of Law, is attorney of record in this matter.

2. On December 12, 2005, counsel filed a petition for habeas corpus on behalf of Shawki [*sic*] Omar. *See* Docket No. 1.

3. At all times relevant to this matter, Mr. Omar has been held in the custody of the United States government (hereinafter "U.S. government").

4. Prior to engaging us as counsel, Mr. Omar's American wife, Sandra Omar, had been taking steps to learn the whereabouts of her husband. Ms. Omar communicated frequently with the International Committee of the Red Cross (hereinafter "ICRC") as well as with various branches of the U.S. government. Based on the information Ms. Omar learned from the ICRC and U.S. government sources, the U.S. government appears to have moved Mr. Omar back and forth between different prisons for purposes of convenience to the U.S. government. Some of this information has been previously provided in the Petition, but is repeated for clarity of the narrative.

5. On or about October 29, 2004, the U.S. government arrested Mr. Omar in his Baghdad residence. U.S. soldiers beat Mr. Omar during the arrest. Mr. Omar's ten-year-old son, Salahedin, also an American citizen, was in a nearby room within hearing distance of his father's beating. U.S. soldiers then confiscated the ten-year-old's passport and arrested Mr. Omar without apprising him of why they were doing so. To date, Mr. Omar still has not been told why he was arrested and why he has been imprisoned for more than fifteen months without charge or access to counsel.

6. On or about December 22, 2004, the U.S. government (via Marie Damour, then United States Consul in Baghdad) finally responded to Ms. Omar's entreaties for information about the whereabouts of her husband. She was informed only that Mr. Omar was imprisoned "under United States military care, custody and control."

7. The U.S. government initially imprisoned Mr. Omar at Camp Cropper, which is near the Baghdad International Airport. By the time the U.S. government responded to Ms. Omar's pleas, the U.S. government had moved Mr. Omar to Camp Bucca, which is near the port city of Umm Qasr, and approximately an eight-hour drive from Baghdad, where Mr. Omar was arrested.

8. On or about October 27, 2005, the U.S. government moved Mr. Omar to Abu Ghraib prison for a consular visit.

9. On or about October 31, 2005, after learning of the possibility of this visit from the ICRC, Ms. Omar wrote to the United States Consul in Baghdad asking them to confirm that her husband had received a consular visit at the U.S. prison at Abu Ghraib.

10. On or about November 2, 2005, Nermeen Omar (who resides in Baghdad) tried to see Mr. Omar at Abu Ghraib, but the U.S. government refused to permit her to see him. U.S. prison officials said that Mr. Omar's number was listed but that he was not allowed visits. They advised Nermeen Omar to return after Monday, November 7, 2005.

11. On or about November 7, 2005, Nermeen Omar went back to Abu Ghraib to visit Mr. Omar but the U.S. government prison officials told her that they had already transferred him back to Camp Bucca, which is an eight hours' drive away. The U.S. government prison officials let Nermeen Omar make an appointment to see him at Bucca on December 10, 2005.

12. On or about December 10, 2005, Nermeen Omar drove eight hours to visit Mr. Omar at Camp Bucca. The U.S. government prison officials acknowledged that Mr. Omar was imprisoned at Camp Bucca but denied Nermeen Omar the right to visit him, claiming some problem with her identification.

13. On or about December 12, 2005, we filed the Petition on Mr. Omar's behalf. We served a copy of the Petition on the U.S. government by registered mail, return receipt requested.

14. On December 19, 2005, the U.S. government received and signed for a copy of the Petition. A true and correct copy of the signed return receipt is attached hereto as Exhibit 1.

15. We provided a copy of the Petition to Ms. Omar, who also provided a copy to the ICRC representative.

16. On or about January 19, 2006, we filed a Motion for Order To Show Cause with the Court. We served a copy of that Motion on the U.S. government.

17. On or about January 23, 2006, the ICRC visited Mr. Omar. The ICRC showed the U.S. govern-

ment officials as well as Mr. Omar a copy of the Petition. The U.S. government prison officials did not permit Mr. Omar, a United States citizen, to keep a copy of the Petition filed on his behalf.

18. On or about January 24, 2006, I was contacted by Edward H. White, Department of Justice. Mr. White explained that he had not seen the habeas petition until he received our motion for order to show cause on or about January 19, 2006, due to an internal file processing error. *See also Respondents' Motion for Extension of Time to Show Cause Why Writ Should Not be Granted, at 1, n.2 (filed Jan. 24, 2006).* We agreed to consent to an extension of time for the U.S. government to respond.

19. At the same time, on or about January 24, 2006, the U.S. government was moving Mr. Omar from the Camp Bucca prison to Abu Ghraib prison.

20. On or about January 27, 2006, I learned via electronic communications from Ms. Omar that the ICRC had been told by U.S. government officials that they transferred Mr. Omar to Abu Ghraib for some type of court proceeding that had been scheduled for February 3, 2006.

21. On or about January 30, 2006, Nermeen Omar was able to visit Mr. Omar at the Abu Ghraib prison.

22. On or about January 30, 2006, we contacted various departments of the U.S. government, including the Department of Justice, the United

States Ambassador to Iraq, and the Consul in Baghdad, to remind them that we are entitled as counsel to attend and participate in any legal proceeding and that we needed to be included to represent Mr. Omar's interests. Participating in a proceeding held at Abu Ghraib appears to be possible because there are functional videolink facilities. We also offered to have a legal representative present in person. True and correct copies of the letters transmitted to the U.S. government are attached hereto as Exhibit 2.

23. On or about February 2, 2006, the U.S. government informed us that it intended to turn Mr. Omar over to the Iraqi criminal authorities for a proceeding and that it intended to do so without giving us any notice. An email from Department of Justice attorney Edward H. White, stated that:

> Mr. Omar is currently in the custody of Multinational Force-Iraq, and a determination was previously made to refer his case to the Central Criminal Court of Iraq (CCCI). We are informed that no hearing in his case is scheduled for Friday, February 3, 2006. We understand that when Mr. Omar appears for any hearing in the CCCI, he is afforded counsel (either retained by him/his family, or appointed by the Court). If Mr. Omar decides to use retained local counsel rather than Court-appointed counsel, we are informed that he/his family can provide to the CCCI the contact information for his retained local counsel before the hearing begins and that Court personnel will notify the retained local

counsel at that time. Please be advised that, whenever scheduled, we would not be able to disclose to you the date of any hearing for security reasons (including the safety of Mr. Omar.).

A true and correct copy of this email is attached hereto as Exhibit 3.

24. On or about February 2, 2006, I responded to Mr. White around 3:30 pm by stating in an email: "This is not acceptable. Please call to discuss."

25. The evening of February 2, 2006, at approximately 6:49 pm, the U.S. government (via Ned White, Department of Justice) responded as follows: "Susan: *I thought that the information I provided was more than sufficient to address the concerns you had expressed.* If you have any specific information that makes you believe that my response is 'not acceptable' then please provide that to me." (Emphasis added.) A true and correct copy of this email is attached as Exhibit 4.

26. On or about February 2, 2006, we filed at approximately 10:30 pm an *Ex Parte* Emergency Motion for a Temporary Restraining Order seeking to prevent the U.S. government officials from turning Mr. Omar over the Iraqi criminal authorities. We have reasonable grounds to believe that Mr. Omar would be tortured if he is turned over to the Iraqi criminal authorities.

27. On or about February 3, 2006, during the pendency of this emergency motion, the U.S. gov-

ernment moved Mr. Omar from Abu Ghraib prison to the Camp Cropper prison. We learned this when Nermeen Omar went to Abu Ghraib prison to make another appointment to see Mr. Omar. The U.S. government prison officials told her they had moved him to Camp Cropper, and she could not see him.

28. Based on the U.S. government's conduct and responses to date, we have a good faith belief that the U.S. government intends summarily and without notice to counsel or the Court to turn Mr. Omar over to the physical and/or legal custody of Iraqi criminal authorities.

Date: February 5, 2006 /s/ SUSAN L. BURKE
SUSAN L. BURKE

BEST AVAILABLE COPY

[EXHIBIT 1]

EXHIBIT 1 05-CV-02374-RMU

SENDER: COMPLETE THIS SECTION

[illegible]

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

KENNETH L WAINSTEIN
UNITED STATES ATTORNEY
DISTRICT OF COLOMBIA
DISTRICT
JUDICIARY CENTER
555 4TH ST N.W.
WASHINGTON DC 20530

COMPLETE THIS SECTION ON DELIVERY

A. Signature X [signature] ☐ Agent ☐ Addressee

B. Received by (Printed Name) DEC 1 9 '00

C. Date of Deliver

D. Is delivery address different from item 1? ☐ Yes ☐ No
If YES, enter delivery address below:

3. Service Type
☐ Certified Mail ☐ Express Mail
☒ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) RA 000 682 1 36805

PS Form 3811, August 2001 Domestic Return Receipt

[EXHIBIT 2]

Burke Pyle LLC

3527 lancaster avenue philadelphia, pa 19104
tel: 215.387.4705 fax: 215.387.4713

January 31, 2006

By facsimile, email and regular mail

Edward H. White, Esq.
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W., Room 6110
Washington, D.C. 20530

Re: Omar v. Harvey, 05-2374

Dear Ned:

As you know, we represent Petitioner Shawqi Omar in the above action challenging his prolonged military detention in Iraq. We have just learned that Mr. Omar is scheduled for some kind of proceeding at the Abu Ghraib prison in Iraq on February 3, 2006—after more than one year of captivity and less than a week before the Government's response to Mr. Omar's habeas petition is due. We write to demand that we be permitted to attend and to participate in this proceeding, and that we be provided with a writing that sets forth any charges against Mr. Omar. Our representative in Baghdad will be able to attend the proceeding.

It is vital that Mr. Omar be present and be accorded a full opportunity to participate meaningfully in any hearing held to determine the lawfulness of his detention. To that end, he must have the opportunity to be heard, to confront fully any evidence against him, to call witnesses, and to the assistance of counsel. It is also essential that any decision be made in writing, and that copies are provided promptly to Mr. Omar and undersigned counsel. As we indicated in the habeas petition, we do not believe that any proceeding short of an Article III criminal proceeding justifies continued detention.

Please notify us immediately with details of who should be contacted to arrange for our attendance at the February 3, 2006, proceeding.

Sincerely,

/s/ SUSAN L. BURKE
SUSAN L. BURKE

Burke Pyle LLC

3527 lancaster avenue philadelphia, pa 19104
tel: 215.387.4705 fax: 215.387.4713

February 1, 2006

By facsimile, email and regular mail

Dr. Zalmay Khalilzad, Ambassador
Embassy of the United States
APO AE 09316
Baghdad, Iraq

Re: U.S. Prisoner Shawqi Ahmad Omar,
Detainee No. 200165
Omar v. Harvey, 05-2374

Dear Ambassador Khalilzad:

I am part of a legal team representing Mr. Shawqi Omar, a United States citizen who has been imprisoned by United States military forces in Iraq since October 29, 2004. After being retained by Mr. Omar's wife and oldest son, we filed a petition for writ of habeas corpus on Mr. Omar's behalf in the United States District Court for the District of Columbia on December 12, 2005, asking for his immediate release. That Court has ordered the United States to explain why the petition should not be granted. The United States' response is due on February 9, 2006.

Yesterday, we learned that Mr. Omar will be subject to an unknown type of hearing at Abu Ghraib on Friday,

February 3, 2006. Mr. Omar has been imprisoned without charge for over a year, but we understand that he may have recently been or may very soon be formally charged. We have not yet received any copy of any charges against him.

We are asking for your immediate assistance in securing the right to counsel for this American citizen at what appears to be a crucial proceeding. We understand Abu Ghraib has videolink facilities, so it should not be a problem for us to participate in the proceeding from the United States. In addition, we would like to send our full-time employee in Baghdad to Abu Ghraib to be physically present during the proceeding to provide additional support for Mr. Omar. Although he is not an attorney, he is our agent and representative and is best able to further our representation of Mr. Omar.

We very much appreciate any assistance you are able to provide. If you learn any information, please contact me at the above numbers or at sburke@burkepyle.com.

Sincerely,

/s/ SUSAN L. BURKE
SUSAN L. BURKE

cc via email: Edward H. White, Esq., U.S. Department of Justice
Greg Mueller, International Committee of the Red Cross

Burke Pyle LLC

3527 lancaster avenue philadelphia, pa 19104
tel: 215.387.4705 fax: 215.387.4713

February 1, 2006

By facsimile, email and regular mail

Richard C. Hermann, U.S. Consul General
Embassy of the United States
APO AE 09316
Baghdad, Iraq

Re: U.S. Prisoner Shawqi Ahmad Omar, Detainee No. 200165
Omar v. Harvey, 05-2374

Dear Mr. Hermann:

I am part of a legal team representing Mr. Shawqi Omar, a United States citizen who has been imprisoned by United States military forces in Iraq since October 29, 2004. After being retained by Mr. Omar's wife and oldest son, we filed a petition for writ of habeas corpus on Mr. Omar's behalf in the United States District Court for the District of Columbia on December 12, 2005, asking for his immediate release. That Court has ordered the United States to explain why the petition should not be granted. The United States' response is due on February 9, 2006.

Yesterday, we learned that Mr. Omar will be subject to an unknown type of hearing at Abu Ghraib on Friday, February 3, 2006. Mr. Omar has been imprisoned without charge for over a year, but we understand that he may have recently been or very soon about to be for-

mally charged. We have not yet received any copy of any charges against him.

We are asking for your immediate assistance in securing protection of the right to counsel for this American citizen at what appears to be a crucial proceeding. We understand Abu Ghraib has videolink facilities, so it should not be a problem for us to participate in the proceeding from the United States. In addition, we would like to send our full-time employee in Baghdad to Abu Ghraib to be physically present during the proceeding to provide additional support for Mr. Omar. Although he is not an attorney, he is our agent and representative and is best able to further our representation of Mr. Omar.

We very much appreciate any assistance you are able to provide. If you learn any information, please contact me at the above numbers or at sburke@burkepyle.com.

Sincerely,

/s/ SUSAN L. BURKE
SUSAN L. BURKE

cc via email: Edward H. White, Esq., U.S. Department of Justice
Greg Mueller, International Committee of the Red Cross

[EXHIBIT 3]

Heather Allred

From: Ned.White@usdoj.gov
Sent: Thursday, February 02, 2006 9:28 AM
To: sburke@burkepyle.com (Receipt Notification Requested) (IPM Return Requested); hallred@burkepyle.com (Receipt Notification Requested) (IPM Return Requested)
Subject: RE: Omar v. Harvey

Susan,

I write in response to your letter dated January 31, 2006 and our subsequent email communications with respect to this matter. Mr. Omar is currently in the custody of Multinational Force-Iraq, and a determination was previously made to refer his case to the Central Criminal Court of Iraq (CCCI). We are informed that no hearing in his case is scheduled for Friday, February 3, 2006. We understand that when Mr. Omar appears for any hearing in the CCCI, he is afforded counsel (either retained by him/his family, or appointed by the Court). If Mr. Omar decides to use retained local counsel rather than Court-appointed counsel, we are informed that he/his family can provide to the CCCI the contact information for his retained local counsel before the hearing begins and that Court personnel will notify the retained local counsel at that time. Please be advised that, whenever scheduled, we would not be able to disclose to you the date of any hearing for security reasons (including the safety of Mr. Omar). I trust that this information satisfactorily resolves the concerns that prompted your inquiry.

Best regards,

Ned White
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
Tel: (202) 514-5108
Fax: (202) 318-4268

-------Original Message------

From: hallred@burkeplye.com [mailto: hallred@burkepyle.com]
Sent: Wednesday, February 01, 2006 6:29 PM
To: usconsulbaghdad@state.gov
Cc: White, Ned (CIV); iraq.iqs@icrc.org; sburke@burkepyle.com
Subject: U.S. Citizen detained at Abu Ghraib
Importance: High

Please see attached urgent letter to Ambassador Khalilzad.

Heather L. Allred

Burke Pyle LLC

3527 Lancaster Avenue

Philadelphia, PA 19104

215.382.2383

267.679.2674 (cell)

215.387.4713 (fax)

hallred@burkepyle.com

This message may contain privileged and confidential information. If you are not the intended recipient, please alert me and delete the message.

Thank you.

[EXHIBIT 4]

Heather Allred

From: Heather Allred [hallred@burkepyle.com]
Sent: Friday, February 03, 2006 3:49 PM
To: 'Aziz Huq'; jmarguli@uchicago.edu'; (hafetz@juris.law.nyu.edu)
Cc: 'sburke@burkepyle.com'
Subject: FW: Omar v. Harvey

------Original Message------
From: Ned.White@usdoj.gov [mailto:Ned.White@usdoj.gov)
Sent: Thursdy, February 02, 2006 6:49 PM
To: sburke@burkepyle.com (Receipt Notification Requested) (1 PM Returned Requested)
Subject: RE: Omar v. Harvey

Susan: I thought that the information I provided was more than sufficient to address the concerns you had expressed. If you have any specific information that makes you believe that my response is "not acceptable" then please provide that to me.

------Original Message------
From: sburke@burkepyle.com [mailto:sburke@burkepyle.com]
Sent: Thursday, February 02, 2006 3:31 PM
To: White, Ned (CIV)
Subject: RE: Omar v. Harvey

This is not acceptable. Please call me to discuss.

Susan L. Burke
Burke Pyle LLC
3527 Lancaster Avenue
Philadelphia, PA 19104
215.387.4709
215.971.5058 (cell)
215.387.4713 (fax)

This message may contain privileged and confidential information. If you are not the intended recipient, please alert me and delete the message.

Thank you.

------Original Message------
From: Ned.White@usdoj.gov [mailto:Ned.White@usdoj.gov]
Sent: Thursday, February 02, 2006 9:28 AM
To: hallred@burkepyle.com (Receipt Notification Requested) (IPM Return Requested); sburke@burkepyle.com (Receipt Notification Requested) (IPM Return Requested)
Subject: RE: Omar v. Harvey

Susan,

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3, 2006. We understand that when Mr. Omar appears for any hearing in the CCCI, he is afforded counsel (either retained by him/his family, or appointed by the Court). If Mr. Omar decides to use retained local counsel rather than Court-appointed counsel, we are informed that he/his family can provide to the CCCI the contact information for his retained local counsel before the hearing begins and that Court personnel will notify the retained local counsel at that time. Please be advised that, whenever scheduled, we would not be able to disclose to you the date of any hearing for security reasons (including the safety of Mr. Omar). I trust that this information satisfactorily resolves the concerns that prompted your inquiry.

Best regards,

Ned White
U.S. Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Ave., N.W.
Washington, D.C. 20530
Tel: (202) 514-5108
Fax: (202) 318-4268

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Sent: Wednesday, February 01, 2006 6:29 PM
To: usconsulbaghdad@state.gov
Cc: White, Ned (CIV); iraq.iqs@icrc.org; sburke@burkepyle.com
Subject: U.S. Citizen detained at Abu Ghraib
Importance: High

Please see attached urgent letter to Ambassador Khalilzad.

Heather L. Allred

Burke Pyle LLC

3527 Lancaster Avenue

Philadelphia, PA 19104

215.382.2383

267.678.2674 (cell)

215.387.4713 (fax)

hallred@burkepyle.com

This message may contain privileged and confidential information. If you are not the intended recipient, please alert me and delete the message.

Thank you.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-2374 (RMU)

SANDRA K. OMAR, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

DECLARATION OF CURT GOERING
[Feb. 5, 2006]

I declare under penalty of perjury that the following is true and correct:

1. My name is Curt Goering. I am the Deputy Executive of Amnesty International, USA. Amnesty International is regarded as the leading human rights watchdog organization. Amnesty International received the Nobel Peace Prize in 1977. Amnesty's work is considered by experts around the globe to be authoritative and reliable.

2. I have served as Deputy Director for the past 20 years. In that position, I am personally responsible for overseeing and supervising teams of researchers who observe and monitor adherence to the rule of law on human rights norms. In addition, I have been a researcher in the Middle East Department at Amnesty International's headquarters in London and have traveled to

Iraq to investigate allegations of torture and abuse and interview survivors of torture.

3. At present, Iraqi government forces do not adhere to the rule of law. Instead, they regularly and systematically engage in acts of torture.

4. According to Amnesty International's research, the acts that have been perpetrated by Iraqi government forces include use of electric shocks on different parts of the body, strangulation, breaking of limbs, sexual abuse, using cigarettes to burn body parts, use of electric drills on arms and legs, and suffocation.

5. The Iraqi government forces have not established a functioning judicial system. The United Nations mission in Iraq recently called for the release of hundreds of individuals in prison, who were being kept imprisoned despite judicial order for their release.

6. There is evidence that the Iraqi criminal courts proceedings for those charged with "terrorist activities" include the introduction of evidence (such as confessions) that has been procured by torture and abuse.

7. At present, the Iraqi criminal courts proceedings fall far short of international standards for fair trials.

8. We understand that the United States government is contemplating turning United States citizen Shawki Omar over to the Iraqi criminal authorities. Based on Amnesty International's extensive research and investigations, we conclude that Shawki Omar would be at grave and

serious risk of being tortured if he were turned over to the Iraqi criminal authorities.

9. Based on Amnesty International's extensive research and investigation, we conclude that Shawki Omar is not likely to receive a trial in conformity with international standards for fair trials if he were to be tried by the Iraqi criminal authorities.

Date: [5 February 2006] /s/ CURT GOERING
CURT GOERING

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 05-2374 (RMU)

SANDRA K. OMAR, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

DECLARATION OF HANIA MUFTI
[Feb. 2, 2006]

I declare under penalty of perjury that the following is true and correct:

1. My name is Hania Mufti. I am employed by Human Rights Watch as a researcher. I am an expert in human rights in Iraq because I have been following and observing Iraqi governmental conduct for many years.

2. I have first-hand knowledge of the present state of affairs in Iraq. I travel to Iraq on a regular basis to observe whether the Iraqi governmental authorities adhere to the rule of law. The information I gather is provided to my employer, Human Rights Watch, which publicizes the state of affairs in Human Rights Watch statements and publications. The information contained in the Iraq chapter of the Human Rights Watch 2006 World Report remains valid to date.

3. In the course of my research I have learned that certain Iraqi governmental authorities and their agents torture and otherwise mistreat persons in their custody and control.

Date: _____ _____

Hania Mufti

Counsel for petitioners have been in contact with Ms. Mufti via email. Ms. Mufti is in Jordan and therefore unable to physically deliver the signed original to counsel for petitioners in time for the filing deadline. Counsel for petitioners will file the original available as soon as it is received from Ms. Mufti.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.: 05-2374 (RMU)

Document No.: 7

SANDRA K. OMAR, ET AL., PETITIONERS

v.

FRANCIS J. HARVEY, ET AL., RESPONDENTS

[Filed: Feb. 6, 2006]

MEMORANDUM OPINION

GRANTING THE PETITIONER'S[1] MOTION FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER

I. INTRODUCTION

The petitioner brings suit against the defendants, seeking release from the custody of the U.S. military in Iraq. This matter is before the court on the petitioner's motion for an *ex parte* temporary restraining order to enjoin the respondents from transferring him to the custody of the Iraqi authorities. Because the petitioner has shown the likelihood that he will suffer irreparable harm if he is transferred to the custody of a foreign gov-

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[1] There are three petitioners in this case, two of whom are next friends of Shawqi Ahmad Omar. Because Shawqi Ahmad Omar is the only petitioner allegedly subject to transfer to the Iraqi authorities, all references are to one petitioner.

ernment, the court grants the petitioner's motion for an *ex parte* temporary restraining order.

II. BACKGROUND

The petitioner is an American citizen held by the U.S. military in Iraq since October 29, 2004. Pet. for Writ of Habeas Corpus ("Pet.") ¶ 2. On January 20, 2006, the government moved the petitioner from Camp Bucca to Abu Ghraib. Pet'r's Mot. for a TRO ("Pet'r's Mot."). On February 2, 2006, the petitioner's attorneys received an e-mail from the respondents stating that the petitioner was "currently in the custody of [the] Multinational Force-Iraq, and a determination was previously made to refer his case to the Central Criminal Court of Iraq." Pet'r's Mot., Ex. 2. Fearing the consequences of transferring the petitioner to the custody of Iraqi authorities, the petitioner's attorneys filed a motion for an *ex parte* temporary restraining order late in the evening of February 2, 2006. The court now turns to that motion.

III. ANALYSIS

A. Legal Standard for an *Ex Parte* Temporary Restraining Order

Under Federal Rule of Civil Procedure 65(b), a party may apply to the court for a temporary restraining order without written or oral notice to the adverse party only if (1) it clearly appears from specific facts shown by affidavit or by verified complaint that immediate and irreparable injury will result to the applicant before the adverse party can be heard in opposition, and (2) the applicant's attorney certifies to the court the efforts made to give notice and the reasons why notice should not be required. FED. R. CIV. P. 65(b); *Haldane v.*

Crockford, 1998 WL 419617, at *1 (D.D.C. Apr. 23, 1998) (noting Rule 65's immediate and irreparable harm requirement for *ex parte* motions).

As the Supreme Court has noted, Rule 65's stringent restrictions "reflect the fact that our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted both sides of a dispute." *Granny Goose Foods, Inc. v. Teamsters*, 415 U.S. 423, 438-39 (1974). For that reason, *ex parte* temporary restraining orders "should be restricted to serving their underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer. *Granny Goose Foods*, 415 U.S. at 439.

To gain *ex parte* relief, a plaintiff must show that such relief is appropriate under the circumstances. *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 650 (6th Cir. 1993). Toward that end, the plaintiff may show that notice is impossible because the defendant is unknown or unable to be found. *Id.* (citing *Am. Can Co. v. Mansukhani*, 742 F.2d 314, 322 (7th Cir. 1984)). Alternatively, the plaintiff may demonstrate that notice to the defendant would render fruitless further prosecution of the action. *Id.* (citing *In re Vuitton et Fils S.A.*, 606 F.2d 1, 4 (2d Cir. 1979). Specifically, the plaintiff must show that "the adverse party has a history of disposing of evidence or violating court orders or that persons similar to the adverse party have such a history." *Id.* at 651.

B. The Petitioner Has Demonstrated Irreparable Harm

In the instant case, the petitioner presents facts that convince this court that irreparable injury will likely

result before the respondents can be heard in opposition to the motion. First, the petitioner faces the possibility of transfer to a government "where he might be tortured or indefinitely confined, which undeniably would constitute irreparable harm." *Al-Marri v. Bush*, 2005 WL 774843, at *4 (D.D.C. Apr. 4, 2005) (unpublished opinion). Specifically, the petitioner is a Sunni Muslim, and Iraqi authorities have, according to the allegations in the motion, condoned the torture of Sunni prisoners and used their police powers to settle sectarian scores. Pet'r's Mot. at 9. Second, the petitioner will suffer irreparable harm if his current habeas claim is eliminated or mooted by the respondent's actions. *Al-Marri*, at *4; *See also Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 55 (D.D.C. 2004) (noting, in a case where an American citizen was held by the Saudi Arabian government allegedly at the behest of the United States, that the allegation that the citizen is deprived of an opportunity to vindicate his rights "is an exceptional situation that demands particular attention to the rights of the citizen"). The danger that the respondents could "obviate" the petitioner's right to "'test the legitimacy of his executive detention' . . . would certainly constitute a threat of irreparable harm." *Al-Marri*, at *5 (quoting *Lee v. Reno*, 15 F. Supp. 2d 26, 32 (D.D.C. 1998)) (internal citations omitted).

In addition to showing that he may suffer irreparable harm, the petitioner also requests to proceed *ex parte* because he is concerned that the respondents "may accelerate the [transfer] process" before responding to the motion. Pet'r's Mot. at 1. Because the defendant has adequately shown that immediate and irreparable injury will result from the respondents' actions and because the petitioner has certified the reasons why

he could not give notice to the respondents, the court holds that the petitioner has met the requirements for an *ex parte* restraining order.[2]

IV. CONCLUSION

For the foregoing reasons, the court granted the petitioner's motion for an *ex parte* temporary restraining order. An order consistent with this Memorandum Opinion was issued the 3rd day of February, 2006.

RICARDO M. URBINA
United States District Judge

---

[2] The court is mindful of the tension created by the constitutional implications of this case, and will address these concerns following full briefing by the parties. Order Granting Pet'r's Mot. for *Ex Parte* TRO (Feb. 3, 2006).

740

77pp

Nos. 07-394 and 06-1666

FILED

FEB 21 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Petitioners,

v.

SANDRA K. OMAR AND AHMED S. OMAR, as next friends of Shawqi Ahmad Omar,

Respondents.

MOHAMMAD MUNAF, et al.,

Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR THE HABEAS PETITIONERS

AZIZ Z. HUQ
JONATHAN HAFETZ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY
SCHOOL OF LAW
161 Avenue of the Americas,
12th Floor
New York, NY 10013
Telephone: (212) 998-6730

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713

JOSEPH MARGULIES*
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890

Counsel for the Habeas Petitioners

**Counsel of Record*

February 21, 2008

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

VINCENT MOCCIO
AMY HANF
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, MN 55402
Telephone: (612) 349-8500

QUESTIONS PRESENTED

I.

When an American citizen is detained abroad under the plenary authority and control of the U.S. military, is the otherwise-available jurisdiction of a federal court to entertain his petition for writ of habeas corpus ousted by the claim that the U.S. military acts pursuant to "international authority"?

II.

If habeas jurisdiction is not defeated, is it an abuse of discretion for the district court to freeze the status quo while adjudicating the merits of the citizen's challenge to his detention and threatened transfer to the custody of a foreign government?

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	14
ARGUMENT	19
I. The Lower Courts Have Jurisdiction	20
A. The Habeas Statute Grants the District Courts Jurisdiction	21
B. The Court Should Not Construe the Habeas Statute to Allow the Executive to Suspend the Writ and Imprison Citizens Without Due Process Merely by Participating in U.N. Military Operations	27
C. The Court Has Repeatedly Entertained Habeas Challenges From Citizens Detained by the U.S. Military Pursuant to International Authorization	30
D. *Hirota v. MacArthur*, a Collateral Challenge to a Foreign Tribunal Filed by Enemy Aliens in This Court, Has No Relevance to This Litigation, a Direct Challenge to U.S. Detention Filed by U.S. Citizens in the District Court	35

TABLE OF CONTENTS – Continued

Page

1. The *Hirota* Petitioners, Unlike Omar and Munaf, Filed Directly in This Court, Though They Were Not Within the Court's Original or Appellate Jurisdiction 35

2. The Petitioners in *Hirota*, Unlike Omar and Munaf, Sought Collateral Review of the "Judgment and Sentences" of a Foreign Tribunal 37

3. The *Hirota* Petitioners, Unlike Omar and Munaf, Were Enemy Aliens Who Did Not Enjoy the Privilege of Litigation in American Courts 41

E. Complying With the Rule of Law Will Not Embarrass the United States..... 44

II. The District Court Did Not Abuse Its Discretion by Entering a Narrowly Tailored Standstill Injunction 45

III. The Court Should Reject the Government's Effort to Short-Circuit Judicial Review 53

A. *Wilson* Supports Issuance of a Standstill Injunction 53

B. The Rule of Non-Inquiry Does Not Preclude Judicial Inquiry Into Habeas Petitioners' Likely Torture After Transfer 57

TABLE OF CONTENTS – Continued

Page

C. The *Omar* Preliminary Injunction is Properly Tailored 59

CONCLUSION 62

TABLE OF AUTHORITIES

Page

CASES

Ahrens v. Clark, 335 U.S. 188 (1948).....35

Ambach v. Norwick, 441 U.S. 68 (1979) 42

The Apollon, 22 U.S. (9 Wheat.) 362 (1824) 55

In re Artt, 158 F.3d 462 (9th Cir. 1998).....58

Ashcroft v. ACLU, 542 U.S. 656 (2004).....53

Auguste v. Ridge, 395 F.3d 123 (3d Cir. 2005).....52

Ex parte Betz, 329 U.S. 672 (1946) 37

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 28, 36

Bob Jones Univ. v. United States, 461 U.S. 574 (1983).....34

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973).....21, 22, 33, 37

Burns v. Wilson, 346 U.S. 137 (1953).....33

In re Burt, 737 F.2d 1477 (7th Cir. 1984).....40, 58

In re Bush, 84 F. Supp. 873 (D.D.C. 1949).....43

In re Bush, 336 U.S. 971 (1949) 42

Cadet v. Bulger, 377 F.3d 1173 (11th Cir. 2004).....52

Chin Yow v. United States, 208 U.S. 8 (1908).....48

In re Dammann, 336 U.S. 922 (1949) 37

Duncan v. Kahanamoku, 327 U.S. 304 (1946).....19

Everett v. Truman, 334 U.S. 824 (1948).....37

FTC v. Dean Foods Co., 384 U.S. 597 (1966).....46

TABLE OF AUTHORITIES – Continued

Page

Fedorenko v. United States, 449 U.S. 490 (1981) 42

Felker v. Turpin, 518 U.S. 651 (1996) 36

Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949) 31

Geofroy v. Riggs, 133 U.S. 258 (1890) 29

Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418 (2006) 46

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) .....*passim*

Harris v. Nelson, 394 U.S. 286 (1969).....25

Hirota v. MacArthur, 338 U.S. 197 (1948).....*passim*

INS v. St. Cyr, 533 U.S. 289 (2001) 16, 27, 29, 38

Johnson v. Eisentrager, 339 U.S. 763 (1950).....43

Jones v. Cunningham, 371 U.S. 236 (1963).....25

In re Kaine, 55 U.S. (14 How.) 103 (1852) 26, 48

Khouzam v. Hogan, ___ F. Supp. 2d ___, No. 3:07-cv-0992-TIV (M.D. Pa. Jan. 10, 2008).....52

Kinsella v. Krueger, 351 U.S. 470 (1956).....29

Kinsella v. United States ex rel. Singleton, 361 U.S. 234 (1960).....28

Madsen v. Kinsella, 343 U.S. 341 (1952) 30, 31

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).....36

May v. Wilson, 153 F. Supp. 688 (D.D.C. 1956).....57

Ex parte McCardle, 73 U.S. (6 Wall.) 318 (1868).....21

TABLE OF AUTHORITIES – Continued

Page

McCreary County, Ky. v. ACLU of Ky., 545 U.S. 844 (2005) 46

Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc., 501 U.S. 252 (1991) 2

Mironescu v. Costner, 480 F.3d 664 (4th Cir. 2007) 57, 58

Mohammed v. Harvey, 456 F. Supp. 2d 115 (D.D.C. 2006) 13, 31

Munaf v. Geren 482 F.3d 582 (D.C. Cir. 2007) 13, 44

Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) 26

Nat'l Wildlife Fed'n v. Buford, 835 F.2d 305 (D.C. Cir. 1987) 46

Omar v. Harvey, 416 F. Supp. 2d 19 (D.D.C. 2006) ..... *passim*

Omar v. Harvey, 479 F.3d 1 (D.C. Cir. 2007) ..... *passim*

Padilla v. Hanft, 547 U.S. 1062 (2006) 61

The Paquete Habana, 175 U.S. 677 (1900) 56

Pettit v. Walshe, 194 U.S. 205 (1904) 60

Prasoprat v. Benov, 421 F.3d 1009 (9th Cir. 2005) 58

Prushinowski v. Samples, 734 F.2d 1016 (4th Cir. 1984) 58

Ex parte Quirin, 317 U.S. 1 (1942) 19

TABLE OF AUTHORITIES – Continued

Page

Rasul v. Bush, 542 U.S. 466 (2004).....14, 16, 21, 22

Reid v. Covert, 354 U.S. 1 (1957) .....*passim*

Republic of Austria v. Altmann, 541 U.S. 677 (2004).....39

Rosado v. Civiletti, 621 F.2d 1179 (2d Cir. 1980).....58

Rumsfeld v. Padilla, 542 U.S. 426 (2004).....37

Sayne v. Shipley, 418 F.2d 679 (5th Cir. 1969).....50

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812).....54, 55, 56

Ex parte Siebold, 100 U.S. 371 (1879).....36

Smallwood v. Clifford, 286 F. Supp. 97 (D.D.C. 1968).....32, 57

Stone v. Robinson, 431 F.2d 548 (3d Cir. 1970).....57

United States v. Abu Ali, 395 F. Supp. 2d 338 (E.D. Va. 2005).....61

United States v. Jung Ah Lung, 124 U.S. 621 (1888).....26, 48

United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955).....31, 32

United States v. Kin Hong, 110 F.3d 103 (1st Cir. 1997).....58

United States v. Wong Kim Ark, 169 U.S. 649 (1898).....29

Valentine v. United States ex rel. Neidecker, 299 U.S. 5 (1936).....48, 49

TABLE OF AUTHORITIES – Continued

Page

Wang v. Ashcroft, 320 F.3d 130 (2d Cir. 2003) 52

Williams v. Rogers, 449 F.2d 513 (8th Cir. 1971) 57

Wilson v. Girard, 354 U.S. 524 (1957) .....*passim*

Zadvydas v. Davis, 533 U.S. 678 (2001) 27

CONSTITUTION, TREATIES, STATUTES, RULES AND REGULATIONS

U.S. Const. art. III, § 2 36

Extradition Treaty, U.S.-Iraq, *signed* June 7, 1934, 49 Stat. 3380 49

28 U.S.C. § 1254 1

28 U.S.C. § 1651 .....7, 46

28 U.S.C. § 2241 .....15, 21, 22, 24, 34

Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498.....50

Foreign Affairs Restructuring and Reform Act, Pub. L. No. 105-277, div. G, 112 Stat. 2681 .....18, 52

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, § 7.....34

Fed. R. Civ. Pro. 65 46

TABLE OF AUTHORITIES – Continued

Page

INTERNATIONAL MATERIAL

Allied High Commission, Law No. 2, Art. 1, 14 Fed. Reg. 7457 31

Allied High Commission, Law No. 13, Art. 1, 15 Fed. Reg. 1056 31

Int'l Law Comm'n, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.648 (May 27, 2004) 26, 44, 45

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 50

R. (on the application of Al-Jedda) v. Sec'y of State for Def., [2007] U.K.H.L. 58 ..... 17, 45

S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950) 31, 32

S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) 49

S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) 22

U.N. Doc. A/CN.4/556 (May 12, 2005) 26

U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility (Mar. 5, 2007) 12

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

10 Annals of Congress 597 (1800) 55

152 Cong. Rec. H7,925-02 (daily ed. Sept. 29, 2006) 34

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Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq, 108th Cong. (2004) 23

Benvenisti, *The International Law of Occupation* (rev. ed. 2004) 50

Brief for Resp't, *Madsen v. Kinsella*, 343 U.S. 341 (1952)(No. 411) 31

Brief for United States, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)(No. 03-339) 56

Brief for United States, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(No. 03-6696) 19, 33

Brief for Appellee, *Wilson v. Girard*, 354 U.S. 524 (1957)(No. 1103) 54

Brief of Pet'r, *Johnson v. Eisentrager*, 339 U.S. 763 (1950)(No. 306) 43

Brief of Pet'r, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239) 35, 38

Documentary App., *Hirota v. MacArthur*, 338 U.S. 197 (1948)(Nos. 239, 240, 248) 38

Fallon, et al., *The Federal Courts and the Federal System* (5th ed. 2003) 37

TABLE OF AUTHORITIES – Continued

Page

Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 Fla. J. Int'l L. 1 (2006) 60

Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179 56

Moore, *A Treatise on Extradition and Interstate Rendition* (1891).....50

Nomination of General George W. Casey, Jr., USA: Hearing Before the S. Comm. On Armed Svcs., 108th Cong. (June 24, 2004) 23

Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflicts and other situations of violence*, 87 Int'l Rev. Red Cross 375 (2005).....51

Pet'n for Writ of Habeas Corpus, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239).....38

Perlman, *Habeas Corpus and Extraterritoriality*, 36 A.B.A. J. 187 (1950) 33

Spear, *The Law of Extradition, International and Inter-State* (3d ed. 1885).....50

Statement by the Press Secretary Regarding Presidential Decision Directive-25.....22

Tr. of Record, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239).....25, 36, 39

BRIEF FOR THE HABEAS PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in No. 07-394 is reported at 479 F.3d 1. The opinion of the district court in that case is reported at 416 F. Supp. 2d 19. The opinion of the court of appeals in No. 06-1666 is reported at 482 F.3d 582, and the opinion of the district court in that case is reported at 456 F. Supp. 2d 115.

JURISDICTION

In No. 07-394, the court of appeals entered judgment February 9, 2007, and denied rehearing May 24, 2007, 07-394 Pet. App. 61a-62a. The Chief Justice extended the time within which to file a petition for writ of certiorari to September 21, 2007. The federal parties filed a petition on that date. In No. 06-1666, the court of appeals entered judgment April 6, 2007, 06-1666, Pet. 1a-9a, and Munaf filed a petition for writ of certiorari June 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process and Suspension Clauses of the United States Constitution, as well as the federal habeas statute, relevant portions of which are reprinted in the petition for certiorari in No. 06-1666, Pet. 1-2.

STATEMENT OF THE CASE

Shawqi Omar

On October 29, 2004, U.S. soldiers arrested Shawqi Omar, an American citizen, at his home in Baghdad. Joint Appendix ("JA") 111. Believing he had some connection to insurgent activity, they beat him severely in the presence of his young son. *Id.* Photos of Omar's injuries, taken by the U.S. military shortly after the beating, are filed with the district court. Pet'rs' Mot. for Preservation Order, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. Feb. 14, 2008)(No. 05-2374). Since that day, Omar has been in U.S. military custody in Iraq, shuttled by his American captors between various U.S. military prisons, including Camp Bucca and the Abu Ghraib prison. JA 111-113. More than three years later, he remains in the custody of American soldiers at Camp Cropper, near Baghdad International Airport.[1]

Omar has done no wrong. He is neither insurgent, nor "enemy combatant," nor terrorist. He is a husband, father, and businessman. Now 46, Omar first came to the United States as a seventeen-year-old student. JA 110-111. In 1983, he married Sandra Kay Sulzle ("Ms. Omar"), in Mobridge, South Dakota, and three years later became an American citizen. JA

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[1] Because the government seeks dismissal on jurisdictional grounds, the Court accepts the allegations in the petitions as true. *See Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 264 (1991).

108-109, 111. The Omars eventually moved to Minnesota, where Omar served in the Minnesota National Guard. He and his wife have six children, all U.S. citizens. JA 111. After Saddam Hussein's fall, Omar, who was born in Kuwait and speaks Arabic fluently, traveled to Iraq in the hope of securing work in the reconstruction. JA 111. From the moment of his arrest, he has maintained his innocence. JA 114-115.

After his arrest, Omar was held *incommunicado* for several months. In late 2004, his wife contacted the American Embassy in Baghdad to learn her husband's whereabouts and welfare. JA 112. On December 22, Marie Damour, United States Consul in Baghdad, told Ms. Omar that her husband was being held "under United States military care, custody, and control." *Id.* Ms. Damour tried to meet with Omar, but the United States military refused to allow it. JA 112-113. In April 2005, Ms. Damour told Ms. Omar that her efforts "have been stymied at every turn" by the military. JA 113. As for Omar, the military repeatedly refused him access to counsel, and denied him legal process. JA 113, 129-131.

In December 2005, Ms. Omar and her adult son filed this habeas petition, JA 88, alleging that Omar's detention violated, *inter alia*, the Due Process Clause. JA 106-107. They named as respondents Omar's immediate custodian – the U.S. officer in command of the U.S. prison where Omar was held – as well as his ultimate custodian – the Secretary of the Army. JA 110.

Petitioners sought either Omar's release from unlawful detention, or an order requiring Respondents "to show just cause for his continued detention," JA 123, and prayed that Respondents not "transfe[r] Mr. Omar to the authority of any other government, sovereign, country, or agency *until this Court has an opportunity to consider and decide the merits of this Petition.*" *Id.* (emphasis added). They did not seek, and have never sought, to interfere with any Iraqi proceeding.[2]

On January 20, 2006, the district court issued a show cause order. JA 90. On January 27, Omar's lawyers learned that Omar would be presented before an Iraqi court February 3, 2006. Counsel immediately contacted counsel for the federal officials and asked to participate in this proceeding. On February 2, the government advised that while "a determination" had been made "to refer [Omar's] case to the Central Criminal Court of Iraq," no date had yet been set for whatever hearing might take place. JA 143. The government refused to provide Omar's lawyers with

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[2] Petitioners also asked that Omar be allowed to meet with counsel. JA 122. In September 2007, spurred by the District Court's order, the government finally agreed to provide counsel with safe transport into Iraq. Counsel met with Omar and Munaf at Camp Cropper in January 2008. *See* Order Denying Without Prejudice Pet'rs' Emerg. Mot. for Access and Granting Pet'rs' Emerg. Mot. for Medical Records and Photographs, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. Sept. 28, 2006)(No. 05-2374); Resp'ts' Resp. to Order to Show Cause, *Omar*, 416 F. Supp. 2d 19 (D.D.C. Oct. 8, 2007)(No. 05-2374).

notice of this hearing, "whenever scheduled," or any assurance that Omar would remain in U.S. custody once it began. *Id.*

Later that same evening, counsel for Omar moved *ex parte* for a temporary restraining order ("TRO") to prevent Omar's transfer to Iraqi custody "*until this Court has an opportunity to consider and decide the merits of this Petition.*" JA 25, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)("*Omar* DC Cir. JA"). Again, counsel sought only "to preserve the *status quo* – namely, Omar in the custody and control of the United States." *Omar* DC Cir. JA 30.

Omar argued that allowing the United States to transfer him to Iraqi custody "would render meaningless [his] constitutional right to challenge the constitutionality and legality of his confinement by U.S. authorities." *Id.* at 32. He also described the "strong likelihood" of torture if he were handed over to the Iraqi Government, *id.* at 34-35, pointing out that senior American officials in Iraq had publicly warned that prisoners – especially Sunni Muslims like Omar – faced a risk of torture at Iraqi hands, *id.* at 35.

On February 3, 2006, the district court granted a TRO "to maintain the status quo . . . for the next ten days." JA 126. The court directed the parties to file supplemental briefs addressing, *inter alia*, "the constitutional implications arising out of judicial versus executive branch authority on the matter." *Id.*

During the ten-day period, Omar was not to "be removed from United States custody." *Id.*[3]

In the briefing requested by the court, Omar provided detailed expert declarations – partially based on U.S. government reports – describing how Iraqi officials "regularly and systematically engage in acts of torture," including the "use of electric shocks . . . strangulation, breaking of limbs, sexual abuse, using cigarettes to burn body parts, use of electric drills on arms and legs, and suffocation." JA 151, 153; *see also Omar* DC Cir. JA 70.[4] The government did not rebut these declarations then and has not done so since.

On February 13, 2006, the district court issued a preliminary injunction, temporarily barring the government from transferring Omar to Iraqi custody. *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. 2006). The court applied the familiar four-factor test: (1) "substantial likelihood of success on the merits"; (2) "irreparable injury if the injunction is not granted"; (3) no "substantia[l]" injury to "other interested parties"; and (4) furtherance of "the public interest." *Id.* at 22 (citation and quotations omitted). Omar met the first factor because the petition raised "substantial, difficult

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[3] Three days later, the court filed a Memorandum Opinion explaining its decision. JA 155-159.

[4] The risk of torture faced by Sunni Muslims in Iraqi custody is described in greater detail in the Brief *Amicus Curiae* of Non-Governmental Organizations.

and doubtful questions" of law meriting careful adjudication. *Id.* (citation and quotations omitted). Assessing the risk of torture, the court concluded the likelihood of irreparable injury to Omar was "high," *id.* at 23, and expressed "concern that any physical transfer of the petitioner may prematurely moot the case or undo [the] court's jurisdiction," *id.* at 28 (citing 28 U.S.C. § 1651).

The court also concluded "that the threat of tangible harm to the petitioner resulting from the court's failure to act outweighs any potential harm to the Executive's exercise of its war powers," and that "it is in the public's interest to have a judiciary that does not shirk its obligations." *Id.* at 29. Accordingly, and to preserve the status quo, the court ordered that "respondents . . . shall not remove the petitioner from United States or MNF-I custody, or take any other action inconsistent with this court's memorandum opinion." 07-394, Pet. 59a.[5] The court did not interfere with any Iraqi proceeding.

The government appealed, and the court of appeals affirmed. *Omar v. Harvey*, 479 F.3d 1 (D.C.

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[5] In the district court, the government argued the U.S. military detained Mr. Omar "as part of the MNF-I and not qua the United States." Resp'ts' Opp. to Petr's *Ex Parte* Mot. for a TRO 13, *Omar v. Harvey*, 416 F. Supp. 2d 19 (D.D.C. Feb. 7, 2006)(No. 05-2374). To eliminate any ambiguity about its ruling, the court's preliminary injunction restrained the respondent U.S. officials from transferring Omar "from United States or MNF-I custody."

Cir. 2007). The court unanimously agreed "the district court has jurisdiction to entertain Omar's habeas petition." *Id.* at 9; *accord id.* at 15 (Brown J., concurring in part and dissenting in part). It rejected the government's argument that *Hirota v. MacArthur*, 338 U.S. 197 (1948)(per curiam), foreclosed judicial inquiry, since *Hirota* turned on four "circumstances": "detention overseas," "the existence of a multinational force," "foreign citizenship," and a "criminal conviction." *Id.* at 7. Absent the latter two, *Hirota* did not apply. *Id.*[6]

A majority of the Court of Appeals also upheld the preliminary injunction prohibiting a transfer that might "defeat the district court's habeas jurisdiction." *Id.* at 12, 14. The majority rejected the government's "primary challenge" to the preliminary injunction – *viz.*, that transfer was properly categorized as "a subset of release." *Id.* at 12. The court noted the "obvious and quite significant difference between transferring Omar to Iraqi authorities and releasing him to walk free from his current detention." *Id.*

The court also rejected Judge Brown's argument in dissent that no preliminary injunction could issue because, even if Omar prevailed, "Iraqi authorities

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[6] The Court of Appeals also found Mr. Omar's challenge to his threatened transfer justiciable. 479 F.3d at 10. Because the parties had neither briefed nor argued the underlying *merits* question of whether statutory or treaty authority for such a transfer existed, the Court of Appeals held that the issue should be addressed in the first instance by the District Court. *Id.*

might arrest Omar the moment U.S. forces release him." *Id.* at 12-13. The majority noted that Judge Brown's objection rested not on the *preliminary* injunction actually under review, but on "speculation" about the contours of a hypothetical *permanent* injunction that might never issue. "[A] preliminary injunction protecting Omar from the *certainty* of transfer," and also of torture, therefore was proper. *Id.* at 13 (emphasis in original).

For similar reasons, the majority rejected as "speculative" Judge Brown's argument (not raised by the government) that final relief would necessarily go beyond release. "Speculating about the conditions under which the military might release Omar or the lawfulness of those conditions is thus not only premature – *the matter may never arise* – but irrelevant" because "the petition does not seek 'release-plus' . . . [it] seeks [only Omar's] release from military custody." *Id.* at 13-14 (emphasis added). Nothing in the injunction, the majority held, "bar[s] a bona fide release of Omar." *Id.* at 12.

The government moved for rehearing *en banc*, which was denied May 24, 2007, with two dissents. 07-394 Pet. 63a-64a.

Mohammad Munaf

Mohammad Munaf emigrated from Baghdad in 1980, leaving behind his parents and six siblings to settle in Romania. He lived there for ten years, where he met his future wife Georgette. JA 32. The two were

married in 1989 and moved to New York the following year. Over the next 15 years, Munaf was a businessman. Between 1996 and 2001, he and his family maintained residences in New York and Bucharest. In 2000, Munaf became a U.S. citizen. *Id.* Today, the Munafs have three young children, all U.S. citizens.

In March 2005, three Romanian journalists asked Munaf to travel with them to Iraq as a paid translator. JA 32-33. The four arrived in Iraq in mid-March 2005. In late March, they were kidnapped by an Iraqi group identifying itself as the "Muadh Ibn Jabal Brigade." The group demanded a ransom for their captives' safe release and Romania's immediate withdrawal from Iraq.[7] On May 22, 2005, after nearly two months in captivity, Munaf and the three journalists were freed. JA 33. They were taken to the Romanian Embassy in Baghdad. Munaf, however, asked to be taken to the U.S. Embassy in the Green Zone. Exhibit 1 at ¶ 13, Pet. for Writ of Habeas Corpus, *Munaf v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Aug. 15, 2006)(No. 06-5324). There, he was arrested by U.S. officers and transported to Camp Cropper, where the U.S. military continues to hold him. JA 33.

Yet Munaf is not an insurgent, an "enemy combatant," or a member of any terrorist or militia group,

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[7] The kidnappers released a video of their prisoners as they were held by two masked men with semiautomatic rifles. CNN later broadcast a still from the video. *See* http://www.cnn.com/interactive/world/0504/gallery.iraq.hostages/frameset.exclude.html. Munaf is the small man squatting on the far right.

JA 33, and the military does not contend otherwise. Rather, it has labeled Munaf a "security internee," a term that remains vague on this record. On August 18, 2006, – after almost fifteen months in U.S. custody – Munaf, through his sister as next friend, brought this habeas petition. He alleged that his detention violated, *inter alia*, the Due Process Clause. JA 28-30, 36-41.

Three weeks later, counsel for the government advised Munaf's counsel that Munaf would be tried for an unspecified civilian crime by an Iraqi court and, if convicted, transferred to Iraqi custody. Like Omar, Munaf is a Sunni Muslim who faces a grave risk of torture if transferred. Moreover, counsel feared that Munaf's transfer to Iraqi authorities "would abuse the process now put in place for the purpose of adjudicating matters on their merits." Pet'rs' Mem. in Supp. of TRO at 13, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Sept. 8, 2006)(No. 06-1455) (internal quotations omitted). Counsel accordingly moved for a temporary restraining order freezing the status quo and preventing any transfer "*until this Court has had the opportunity to decide the merits of Mr. Munaf's Petition for Writ of Habeas Corpus.*" Pet'rs' Mot. for TRO, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Sept. 8, 2006)(06-1455)(emphasis added). Like Omar, Munaf did not seek to interfere with any Iraqi proceeding.

By this time, the district court in *Omar* already had held that the absence of a foreign conviction was one factor distinguishing *Omar* from *Hirota*. *Omar*,

416 F. Supp. at 26 n.11. Thereafter, U.S. military officers presented Munaf before the Central Criminal Court of Iraq ("CCCI") to face charges related to his alleged role in the kidnapping. *Id.*; Resp. to Pet'rs' Supp. Mot. for TRO at 1, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Oct. 16, 2006)(No. 06-1455).

Iraqi law requires that an aggrieved party issue a formal complaint before a prosecution can go forward. JA 52-53, *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. 2007)(No. 06-5324)("*Munaf* DC Cir. JA"). Because Munaf was charged with kidnapping Romanian citizens, the CCCI could not begin a prosecution without a complaint from the Romanian government. *Id.* At an October 12 proceeding, Lieutenant Robert Pirone of the United States Coast Guard appeared in the CCCI to make a formal complaint against Munaf. Lieutenant Pirone said the Romanian Embassy had authorized him to appear on its behalf. *Id.* at 52. Pirone later claimed this authorization was documented in a letter submitted in advance to the Iraqi court. *Id.*

No such letter was produced. *Id.* at 48. It is not part of the record in any court. Neither Munaf nor his counsel has seen it, nor have they been able to inquire into the circumstances under which it was purportedly obtained. The Government of Romania has repeatedly denied it authorized Lieutenant Pirone to speak on its behalf. *Id.* at 86; *see also* U.N. HRC, Communication No. 1539/2006, *Munaf v. Romania* (CCPR), Submissions of Romanian Gov't on Admissibility, ¶ 21 (Mar. 5, 2007)("Romanian representatives from the Embassy

in Iraq had no knowledge either of the trial, nor of the alleged authorization allegedly given by the Romanian authorities to U.S. officer Robert Pirone.").[8]

The Iraqi trial court convicted Munaf and sentenced him to death. JA 49. Munaf's appeal to the Court of Cassation is pending.

Munaf notified the District Court of his conviction and death sentence. Pet'rs' Supp. Mot. for TRO at 1, *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. Oct. 13, 2006)(06-1455). Nonetheless, on October 19, 2006, the District Court dismissed the case for want of subject matter jurisdiction and denied the TRO application as moot. *Mohammed v. Harvey*, 456 F. Supp. 2d 115 (D.D.C. 2006). Munaf appealed, and a divided panel of the D.C. Circuit affirmed, concluding that its hands were tied by the *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948). *Munaf v. Geren*, 482 F.3d 582, 584-585 (D.C. Cir. 2007).

Speaking for the majority, Judge Sentelle questioned "the logic of *Hirota*," "particularly as applied to U.S. citizens," and "acknowledged" that this Court's recent decisions in *Hamdi v. Rumsfeld*, 542 U.S. 507

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[8] Mr. Munaf has filed a complaint against Romania in the United Nations Human Rights Committee, alleging, *inter alia*, that Romania did not act to protect Mr. Munaf from a death sentence. In its response, Romania has insisted Pirone had no authority to act for the Romanian Government. The documents are available at http://www.brennancenter.org/dynamic/subpages/download_file_49032.pdf and http://www.brennancenter.org/dynamic/subpages/download_file_49034.pdf.

(2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), cast doubt on "*Hirota*'s continuing vitality." 06-1666, Pet. 5a-6a. Concurring in the judgment, Judge Randolph rejected the government's jurisdictional argument, agreeing with Munaf that citizenship and detention by U.S. forces were "critical" distinctions between this case and *Hirota*. 06-1666, Pet. 7a (Randolph, J., concurring in the judgment); *see also id.* at 8 (extending *Hirota* in this case "would contradict . . . the majority and dissenting opinions in *Rasul*"). Judge Randolph, however, would have denied relief on the merits based on grounds neither party had briefed. *Id.* at 7-9.

On May 9, the court below granted Munaf's motion to stay its mandate pending the filing and ultimate disposition of this petition. Order Granting Mot. to Stay the Mandate, *Munaf v. Geren*, 482 F.3d 582 (D.C. Cir. May 9, 2007)(No. 06-5324); JA 12. The effect of that order was to continue the Court of Appeals' interim injunction of December 15, 2006, which restrained Munaf's transfer to Iraqi custody *pendente lite*. Order Granting Mot., *Munaf*, 482 F.3d 582 (D.C. Cir. Dec. 15, 2006)(No. 06-5324)(en banc); JA 9.

SUMMARY OF ARGUMENT

U.S. citizens imprisoned by U.S. officers at a U.S. prison in Iraq may invoke the habeas statute to challenge their detention and threatened transfer to Iraqi custody. The district courts therefore have jurisdiction, and the *Omar* court that so held did not abuse its discretion in freezing the status quo to allow

measured consideration of Omar's constitutional and statutory claims.

The Executive challenges both jurisdiction and the power to preserve it. Its arguments are two attempts aimed at one result – a "blank check" over "the rights of the Nation's citizens." The Court recently refused this demand, and should again. *Hamdi*, 542 U.S. at 536 (plurality op.); *see also id.* at 553 (Souter, J., concurring); *id.* at 554 (Scalia, J., dissenting on other grounds). For to accept either of the government's arguments here would render *Hamdi* a dead letter.

I. The habeas statute grants federal courts jurisdiction to hear petitions from citizens "held under or by color of the authority of the United States" or imprisoned "in violation of the Constitution or the laws or treaties of the United States." 28 U.S.C. § 2241(c)(1), (c)(3). The petitions filed in the District Court on behalf of Omar and Munaf fit comfortably within both provisions.

Omar and Munaf are detained by U.S. soldiers. Their immediate custodian is a Lieutenant Colonel in the U.S. Army. Every officer in the chain of command is a soldier in the U.S. Army. Their ultimate custodian, the Secretary of the Army, is present within the district court's territorial jurisdiction. The U.S. military – not the U.N., not any coalition partner, and not Iraq – has plenary and exclusive authority over their custody. They are, therefore, "held under or by color of the authority of the United States." And their claim

that although innocent, they have been detained without judicial process, "unquestionably describe[s] custody in violation of the Constitution or laws or treaties of the United States." *Rasul*, 542 U.S. at 483 n.15.

The government nevertheless contends that American participation in military operations authorized by the U.N. Security Council vests the Executive with the power to hold citizens without judicial review. Its position contradicts the plain meaning of the habeas statute and raises "serious constitutional questions." *INS v. St. Cyr*, 533 U.S. 289, 314 (2001). Only Congress has the power to limit a citizen's constitutional right to challenge Executive detention. And the Executive cannot by international agreement achieve what the Constitution forbids. *See Reid v. Covert*, 354 U.S. 1, 5-6 (1957)(plurality op.). The government's argument also brooks no geographic limit: Invoking "international authority," Executive officials could seize and detain citizens in the United States without judicial review. This is plainly not the law.

The government relies wholly on the nine-sentence *per curiam* in *Hirota*. But *Hirota* involved habeas applications filed in this Court by enemy aliens who raised collateral challenges to "the judgments and sentences" of a foreign tribunal. The case is irrelevant to applications filed in the district court by U.S. citizens making a direct challenge to U.S. detention by U.S. soldiers at a U.S. prison. Omar and Munaf do not seek to "overrule" *Hirota*; it is the

government that seeks to extend *Hirota* beyond its original sphere.

The Executive supports this attempt to oust the federal courts of jurisdiction by speculating about intergovernmental friction. But international law sets a clear rule – hinged on "effective control" – distributing jurisdiction when several nations act in coordination. Applying that rule, and rejecting arguments such as the ones made by the government here, the British House of Lords recently affirmed jurisdiction over British officers within the Multi-National Force-Iraq ("MNF-I") who were detaining a British citizen. *R. (on the application of Al-Jedda) v. Sec'y of State for Def.*, [2007] U.K.H.L. 58. Compliance with the rule of law will thus not embarrass the United States or place it at odds with the United Nations.

II. Having jurisdiction, the District Court did not abuse its discretion by issuing a standstill injunction. The government's claim that it has unlimited power to transfer would leave jurisdiction an empty vessel. For if a federal court lacks power to enter such routine interim relief, habeas jurisdiction is hollow and Due Process a nullity.

The District Court has the power and duty to adjudicate two claims on remand: a challenge to indefinite detention by U.S. officers, in violation of the Due Process Clause, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); and a challenge to transfer to foreign custody and the consequent high risk of torture, in violation of the Due Process Clause and Section 2242(a) of the Foreign Affairs Restructuring and Reform Act ("the

FARR Act"). Pub. L. No. 105-277, div. G, 112 Stat. 2681-822 (1998). Federal officials lack authority to detain Omar and Munaf, innocent American citizens. They also lack authority under the applicable treaty to transfer U.S. citizens to Iraqi custody. Further, any transfer would be unlawful given the unrebutted evidence of likely torture. At this threshold stage, a preliminary injunction to permit litigation of these matters was entirely proper.

The government nonetheless argues it is entitled to judgment as a matter of law, relying principally on *Wilson v. Girard*, 354 U.S. 524 (1957), and the rule of non-inquiry. But *Wilson* confirms federal court jurisdiction to inquire into the statutory authority for an extraterritorial transfer, and the common-law rule of non-inquiry does not apply because Congress has directed courts to inquire into likely torture.

Finally, the government attacks the *preliminary* injunction with alarming speculation about the contours of a possible *final* injunction. But the dire consequences predicted by the government simply do not arise from an injunction that merely freezes the status quo. Petitioners may or may not prevail on all or some of their claims. Depending on the circumstances at that time, the courts below will fashion relief. Their work will then be amenable to review here.

The Court should remand these cases to the District Court for the "prudent and incremental"

adjudication of habeas petitioners' claims. *Hamdi*, 542 U.S. at 539 (plurality op.).

ARGUMENT

As it has during prior periods of public anxiety, the Executive Branch once again demands the power to detain its citizens unrestrained by judicial review. In *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), for example, the government argued that martial law in Hawaii "was not subject to any judicial control whatever," and issued orders that "prohibited even [the] accepting of a petition for writ of habeas corpus by a judge or judicial employee or the filing of such a petition by a prisoner or his attorney." *Id.* at 309. In *Hamdi v. Rumsfeld*, the government argued that the Executive could designate a citizen an enemy combatant, and hold him without judicial scrutiny because the designation was "a quintessentially military judgment, representing a core exercise of the Commander-in-Chief authority." Brief for United States at 25, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(No. 03-6696). The Court has generally resisted such extravagant demands. Those few occasions when it has succumbed have not been the Court's "finest hour." *Hamdi*, 542 U.S. at 569 (Scalia, J., dissenting)(citing *Ex parte Quirin*, 317 U.S. 1 (1942)).

Today, the government argues that a U.N. Security Council Resolution transforms the United States into "the agent" of the United Nations and permits the military to detain American citizens without

judicial review. G. Br. 17-36. Alternatively, the government argues that any role the Judiciary might play is meaningless because the Executive has unlimited power to transfer citizens to other sovereigns. Both arguments should find no favor with the Court.

I. The Lower Courts Have Jurisdiction.

Omar and Munaf are U.S. citizens who have been detained for years by U.S. officers at a U.S. prison. Their immediate custodian is a Lieutenant Colonel in the U.S. Army. Every officer up and down the chain of command is a soldier in the U.S. Army. And their ultimate custodian, the Secretary of the Army, is present within the District Court's territorial jurisdiction. Having done no wrong, they seek only what is guaranteed to all American citizens by the Suspension Clause, the Due Process Clause, and the habeas statute: the opportunity to test the lawfulness of their continued confinement in federal court.

Yet the government maintains the courts of their country are closed to them because the Executive has elected to become part of the "Multi-National Force-Iraq." This, the Executive claims, places federal officials beyond the reach of American courts, and the Constitution beyond the grasp of American citizens. The government is profoundly mistaken.

A. The Habeas Statute Grants the District Courts Jurisdiction.

The modern habeas statute is a jurisdictional grant of extraordinary breadth. One section gives district courts jurisdiction over prisoners held "under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). Another empowers the court to order relief whenever a prisoner is detained "in violation of the Constitution or laws or treaties of the United States." *Id.* at § 2241(c)(3). Taken together, "[i]t is impossible to widen this jurisdiction." *Ex parte McCardle*, 73 U.S. (6 Wall.) 318, 326 (1868). Omar and Munaf satisfy both provisions, and their allegations "fit[] comfortably within the terms of the modern habeas statute." *Omar*, 479 F.3d at 9.

First, Omar and Munaf are detained "under or by color of the authority of the United States." *Id.* (quoting § 2241(c)(1)). They are held by U.S. soldiers, and their ultimate custodian – the person who decides whether they remain imprisoned – is the Secretary of the Army, a federal official within the jurisdiction of the District Court who must answer to a federal court's command.[9]

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[9] The habeas statute instructs courts to act within their respective jurisdictions, i.e., "that the court issuing the writ have jurisdiction over the *custodian*." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973)(emphasis added); *accord Rasul v. Bush*, 542 U.S. 466, 478-479 (2004).

Second, Omar and Munaf allege they have done no wrong but are imprisoned by federal officials without legal process. This "unquestionably describe[s] 'custody in violation of the Constitution or laws or treaties of the United States.'" *Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004)(quoting § 2241(c)(3)); *Hamdi*, 542 U.S. at 529 (indefinite detention violates "the most elemental of liberty interests – the interest in being free from physical detention by one's own government"). Jurisdiction under the statute requires "nothing more." *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973); *Rasul*, 542 U.S. at 482-84.

The government strains to avoid this clear statutory command by arguing that Omar and Munaf are held under MNF-I "authority," not "under or by color of the authority of the United States." G. Br. 17-18. But this contention is belied by the record.

The government concedes, as it must, that the entire MNF-I serves under the "unified command" of the U.S. military. *See* S. C. Res. 1546, ¶ 10, at 4, U.N. Doc. S/RES/1546 (June 8, 2004); G. Br. 2. In this context, "[c]ommand constitutes the authority to issue orders covering every aspect of military operations and administration."[10] The government also

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[10] Statement by the Press Secretary Regarding Presidential Decision Directive-25 (May 6, 1994), http://www.fas.org/irp/offdocs/pdd25.htm (last visited Feb. 18, 2008). This Decision Directive, issued by President Clinton May 3, 1994, describes in detail the role of U.S. forces in UN-authorized military operations.

(Continued on following page)

concedes that the immediate and ultimate custodians in this litigation, as well as every person responsible for the detention of Omar and Munaf, are American officers who answer only to the U.S. Constitution. As General George Casey, the former Commander of the MNF-I, explained to the Senate Armed Services Committee, U.S. soldiers participating in the MNF-I have "no reporting chain that goes back to the United Nations." *See Nomination of General George W. Casey, Jr., USA: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (June 24, 2004)(Statement of Gen. Casey); G. Br. 2. Indeed, when asked by the Committee whether the international character of the MNF-I would lead to any loss of U.S. authority, General Casey assured the Committee there would be "none at all[.]" *Id.*[11]

The United States military thus has plenary and absolute control over Omar and Munaf. Indeed, on

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While the Directive has never formally been made public, the account released by the White House vowed that "[t]he President retains and will never relinquish command authority over U.S. forces. . . . Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice. . . ." *Id.*

[11] *See also Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, 108th Cong. 3 (2004)(U.S. soldiers in MNF-I are "subject to the authority, direction and control of the Commander, U.S. Central Command"), http://www.senate.gov/~armed_services/statemnt/2004/June/Casey.pdf (last visited Feb. 18, 2008).

this record, it is impossible to identify any sense in which "the authority of the United States" is *lacking*. 28 U.S.C. § 2241(c)(1).[12] Nothing in this record suggests, for example, that the U.S. officials who detain Omar and Munaf would have to ask permission from other member States before releasing them. Nor does the government claim that there is any other State, including Iraq, which could release them if the United States objected.[13]

This unilateral authority accounts for the government's concessions before the Court of Appeals in *Omar*, where it agreed not only that the prisoners were "in the authority and control of the United States," and "'subject to' no independent MNF-I authority," but that the degree of control exercised by the United States empowered it to *refuse* Iraq's demand for custody. *See Omar v. Harvey*, 479 F.3d 1, 9 (D.C. Cir. 2007)(citations omitted); Tr. of Oral

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[12] Conceivably, there may be cases in which U.S. involvement in a prisoner's detention is so *de minimis* that U.S. officers would lack the authority to compel his release and his ultimate custodians would not be within the territorial jurisdiction of a district court. If the government were to assert such a defense in a particular case, the Court should examine it in the same pragmatic light as we urge it in this case. *See also supra*, 22-23 n.10.

[13] Hence, the government has never suggested it could not comply with the preliminary injunction entered by the District Court in *Omar*, or with the stay entered by the Circuit Court in *Munaf*. Nor has it asserted it would decline to obey a federal court order. At the end of the day, U.S. government officials alone will decide whether to release Omar and Munaf.

Argument at 11-12, 25-26, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126); *see also* G. Br. 39-40 n.10 (federal officials make a discretionary decision before any transfer to Iraqi custody). If the United States *does not* have "authority and control" over the prisoners, then no one does and they languish in a legal black hole.[14]

Conceding its unlimited authority to detain or release, the government nonetheless asks the Court to accept the formalistic fiction of MNF-I "authority." But habeas corpus is celebrated as the Great Writ precisely because it is *not* a "formalistic remedy." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). The great genius of the writ is its time-tested "ability to cut through barriers of form," *Harris v. Nelson*, 394 U.S. 286, 291 (1969), in order that the Executive not

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[14] The government concedes these facts, but argues the same could have been said of General Douglas MacArthur, the ultimate custodian in *Hirota v. MacArthur*. We discuss *Hirota* at length below. *See infra*, 35-44. Here it is sufficient to note that the government is simply wrong about *Hirota*. In *Hirota*, Solicitor General Philip Perlman argued "that in case of conflict it would be General MacArthur's duty, so long as he is the Supreme Commander, to obey the directives of the Far Eastern Commission and not our War Department." Tr. of Record at 42, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239). The Solicitor General asserted that MacArthur *was not* "acting under the Constitution and laws of this country," that "no process that could be issued from this court . . . would have any effect on his action," and that General MacArthur *did not* serve "under the Joint Chiefs of Staff." *Id.* at 50-51. The government has never made such an argument here.

be allowed to imprison a citizen without judicial review.

To that end, the Court has consistently read the statute functionally. *See, e.g., In re Kaine*, 55 U.S. (10 How.) 103, 109-111 (1852)(U.S. commissioner who arrested Irish national at the request of the British government was acting under authority of the United States although he did not consult with the United States government, which played no role in his actions); *see also United States v. Jung Ah Lung*, 124 U.S. 621, 626 (1888)(Chinese national detained by steamship master at the direction of San Francisco customs authorities was in custody "under or by color of the authority of the United States"). The Court should do so again here.[15]

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[15] This reading of the habeas statute is also consistent with international law, which makes the U.S. legally responsible for the prisoners because it maintains "effective control" over their custody. *See* Int'l Law Comm'n, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004); *see also Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)("[A]n act of Congress ought never to be construed to violate the law of nations in any other possible construction remains."). Applying this standard, U.N. bodies disclaim responsibility for the conduct of troops acting pursuant to Security Council authorization when those troops remain under the "operational command and control" or "effective command and control" of participating governments. U.N. Doc. A/CN.4/556 (May 12, 2005).

B. The Court Should Not Construe the Habeas Statute to Allow the Executive to Suspend the Writ and Imprison Citizens Without Due Process Merely by Participating in U.N. Military Operations.

The government recognizes that, but for its claim of multinational authority, the district court would have jurisdiction. Tr. of Oral Argument at 24, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126). According to the government, therefore, jurisdiction is ousted solely by the Executive's "agree[ment] to participate in the MNF-I . . . in conjunction with U.N. Resolution 1546." G. Br. 24. The Executive thus identifies its own action – absent any congressional involvement – as sufficient to eliminate jurisdiction. The Court should avoid the "serious constitutional questions" created by this claim, which allows the Executive Branch to suspend the Writ by its unilateral decision to participate in multinational military operations. *INS v. St. Cyr*, 533 U.S. 289, 314 (2001); *see also Zadvydas v. Davis*, 533 U.S. 678, 692 (2001).[16]

It has long been understood that the Executive acting alone has no power to suspend the writ: "If at

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[16] Under the government's theory, a person seized before the U.S. agreed to participate in the MNF on May 22, 2003, could invoke habeas jurisdiction, but would forfeit jurisdiction as soon as the agreement were entered, G. Br. 24, and apparently would regain it if the agreement lapsed, *id.* at 22 n.5. Thus, by adjusting arrangements with foreign governments, the Executive can choose whether to allow habeas review.

any time the public safety should require the suspension [of habeas], *it is for the legislature to say so.*" *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807) (emphasis added); *accord Hamdi*, 542 U.S. at 536-37 (plurality op.); *id.* at 545 (op. of Souter, J.); *id.* at 562 (Scalia, J., dissenting).

It is equally clear that Munaf and Omar – U.S. citizens held by federal officials – are entitled to the protections of the Due Process Clause. "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid v. Covert*, 354 U.S. 1, 6 (1957)(plurality op.); *Hamdi*, 542 U.S. at 534 n.2 (plurality op.)(citizen detained by military during war is "constitutionally entitled" to due process); *accord Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

The Due Process and Suspension Clauses converge in habeas; only through habeas can citizens detained by the Executive vindicate these entitlements. *Hamdi*, 542 U.S. at 555-556 (Scalia, J., dissenting) ("[H]abeas corpus [is] the instrument by which due process could be insisted upon by a citizen illegally imprisoned."). Here, Congress took no step to suspend the writ. The government's interpretation of the habeas statute would therefore mean that the Executive Branch could suspend the Writ of its own will and imprison a citizen without judicial review or due process. This it cannot do.

The Executive cannot entreat with a foreign sovereign to do what the Constitution forbids. In *Reid v. Covert*, the government argued that an executive agreement between the United States and Great Britain vested military courts with "exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents." Pursuant to this agreement, the United States tried and convicted two American citizens before military tribunals. 354 U.S. at 4, 15 (plurality op.).[17]

The Court disagreed, underscoring the long-settled rule that "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Id.* at 5-6, 16; *accord Geofroy v. Riggs*, 133 U.S. 258, 267 (1890); *United States v. Wong Kim Ark*, 169 U.S. 649, 704 (1898)(invalidating treaty as inconsistent with Fourteenth Amendment).

That the government's interpretation of the habeas statute raises such grave constitutional concerns is reason enough to reject it. *St. Cyr*, 533 U.S. at 298-303. Constitutional avoidance is especially

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[17] *See* Executive Agreement of July 27, 1942, 57 Stat. 1193 (cited in *Reid v. Covert*, 354 U.S. 1, 15, n.29 (1957)). *Reid* was consolidated with *Kinsella v. Krueger*, 351 U.S. 470 (1956), involving another citizen who, like Reid, killed her husband, a U.S. serviceman.

appropriate here because the government's position cannot be confined to detentions abroad. If "international authority" alters the statutory command, as the government maintains, then it makes no difference where the prisoners are held.[18] So long as the United States, in its capacity as unified commander of the MNF, denominates the jailer as part of the MNF-I, jurisdiction would be ousted, even if the prisoner were held in Charleston, South Carolina.

C. The Court Has Repeatedly Entertained Habeas Challenges From Citizens Detained by the U.S. Military Pursuant to International Authorization.

The Executive's claim, moreover, is inconsistent with prior decisions of the Court that have often entertained habeas applications from citizens detained by the military pursuant to "international authority." *Madsen v. Kinsella*, 343 U.S. 341 (1952), for instance, involved an American citizen convicted and sentenced by an occupation court in Germany. This court was the creature of a multinational "Occupation Statute," drafted jointly by France, England, and the United States, which divided post-war Germany into three zones and authorized detention and trial of civilians by the Allies. *Id.* at 345 n.7, 367-370

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[18] Nor is there any reason why the government's argument would not equally extend to bilateral agreements with Iraq or another State, which would similarly create a "multinational force under international authority." G. Br. 21.

(referencing Allied High Commission, Law No. 2, Art. 1, 14 Fed. Reg. 7457 and Allied High Commission, Law No. 13, Art. 1, 15 Fed. Reg. 1056-1057); *see also* Brief for Resp't at 7 & n.4, *Madsen v. Kinsella*, 343 U.S. 341 (1952)(No. 411): *see also* Brief *Amicus Curiae* of National Institute of Military Justice (military command cannot be delegated to U.N., and was not delegated in Iraq).[19]

Likewise, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court considered a habeas application brought by a citizen detained by the U.S. military in Korea. U.S. military operations in Korea, as in Iraq, were authorized by a U.N. Security Council Resolution. *See* S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950). As in Iraq, this Resolution envisaged a multinational force under the unified command of the

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[19] The "Occupation Statute" replaced a similar Allied agreement establishing military courts in post-war Germany. *Madsen*, 343 U.S. at 362-369 (appendix). In *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir.), *cert. denied*, 338 U.S. 879 (1949), the circuit court had held that a tribunal convened under the earlier Allied authority was international in nature, and thus not a court of the United States. *Id.* at 985. Yet when this Court addressed the successor courts in *Madsen*, it never questioned that it had habeas jurisdiction over Madsen's petition.

The district court in *Munaf* tried to distinguish *Madsen* by suggesting the international court there had been "established unilaterally by the United States." *Mohammed v. Harvey*, 456 F. Supp. 2d 115, 125 (D.D.C. 2006). As noted above, and as stated in *Flick*, this is incorrect. The court that tried, convicted, and sentenced Madsen existed only because the "Occupation Statute" authorized its creation, and that statute was entirely international.

United States. *Id.* at ¶¶ 3-4. If the government were correct, this Resolution would have stripped the courts of habeas jurisdiction. Yet the Court held that the district court had jurisdiction over Toth's ultimate custodians such that habeas relief would be proper. *Toth*, 350 U.S. at 23; *accord Smallwood v. Clifford*, 286 F. Supp. 97 (D.D.C. 1968)(considering habeas application from citizen held by United States military in Korea pending Korean prosecution).[20]

Even the case upon which the government places greatest reliance in its challenge to the preliminary injunction, *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam), supports jurisdiction. In *Wilson*, the petitioner, an American soldier detained in Japan, faced prosecution in Japanese courts for a violation of Japanese law under a bilateral treaty and executive agreement. *Id.* at 526-527. If the government's reading of the habeas statute were correct, the *Wilson* Court should have simply dismissed for want of jurisdiction. Yet neither this Court nor the lower courts questioned their power to hear Girard's habeas petition. *Id.*; *see infra*, 53-57.

It is no answer to point out that some of the prisoners in these cases were transferred to the United States in the course of the litigation. In other

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[20] Similarly, *Reid v. Covert* arose in the context of U.S. military operations in Britain authorized by a bilateral Executive Agreement, the terms of which gave the United States the power to detain prisoners. 354 U.S. at 15-16 n.29 (plurality op.). Yet the Court granted relief under the habeas statute. *Id.* at 41.

cases the prisoners were detained overseas throughout the case, with no change in the jurisdictional calculus.[21] And as the Court in *Hamdi* recognized, grafting a territorial exception onto the habeas statute would create a "perverse incentive" to "keep citizen-detainees abroad." 542 U.S. at 524 (plurality op.). It would reward the government for abandoning what former Solicitor General Perlman called its "practice" of returning citizens to this country where they can file a "normal habeas." Perlman, *Habeas Corpus and Extraterritoriality*, 36 A.B.A. J. 187, 190 (1950).

In any event, as the government pointed out in *Hamdi*, the location of detention has nothing to do with its legality: "Once the military makes a determination that an individual is an enemy combatant who should be detained in connection with the conflict, the *place* where the combatant is detained in no way affects the legality of that determination." Brief for United States at 20, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)(No. 03-6696)(emphasis in original); *see also id.* at 31 (lawfulness of Hamdi's detention unaltered

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[21] *See, e.g., Burns v. Wilson*, 346 U.S. 137, 139 (1953) (plurality op.)(for prisoners detained overseas, question was "not whether the District Court has any power at all to consider petitioners' [habeas] applications; rather our concern is with the manner in which the Court should proceed to exercise its power"); *Braden*, 410 U.S. at 498 ("Where American citizens confined overseas . . . have sought relief in habeas corpus . . . , the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim.") (internal citations omitted).

"when, consistent with the intent of the Geneva Convention, he is removed from Afghanistan to a safer location").

Thus, the Court has routinely reviewed habeas applications from citizens detained by the military pursuant to "international authority." And as this doctrine has deepened, Congress has shown no inclination to alter these results. The evidence of intent, however, is supported by more than mere congressional inaction. *Cf. Bob Jones Univ. v. United States*, 461 U.S. 574, 601 (1983). In 2006, Congress amended the habeas statute to exclude alien enemy combatants detained overseas. Military Commissions Act of 2006, Pub. L. No. 109-366, § 7, 120 Stat. 2600, 2635-2636 (amending 28 U.S.C. § 2241(e)(1)). But Congress deliberately left a citizen's right to challenge his detention in habeas completely undisturbed.[22]

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[22] The different treatment for citizens was deliberate. *See* 152 Cong. Rec. S10,243-01, S10,267 (daily ed. Sept. 27, 2006) (Remarks of Sen. Jon Kyl)(R-AZ)("This legislation has nothing to do with citizens. . . . *And, of course, the writ of habeas corpus applies to U.S. citizens.*" (emphasis added)); 152 Cong. Rec. H7,925-02, H7,946 (daily ed. Sept. 29, 2006)(Remarks of Rep. Dan Lungren)(R-CA) ("*[U]nder the expressed terms of the bill, an American citizen will have the unencumbered ability to challenge his or her detention as they have under the Constitution.*" (emphasis added)).

D. *Hirota v. MacArthur*, a Collateral Challenge to a Foreign Tribunal Filed by Enemy Aliens in This Court, Has No Relevance to This Litigation, a Direct Challenge to U.S. Detention Filed by U.S. Citizens in the District Court.

The government makes no serious attempt to overcome these impediments to its position. Instead, it leans heavily on the *per curiam* in *Hirota*, where the Court refused to entertain litigation brought by convicted Japanese war criminals who challenged the judgments and sentences of the International Military Tribunal for the Far East ("IMTFE"). But *Hirota* is distinguishable in three fundamental respects. To recognize this is not to "overrule" *Hirota*, as the government insists, but merely to confine it to its proper sphere.

1. The *Hirota* Petitioners, Unlike Omar and Munaf, Filed Directly in This Court, Though They Were Not Within the Court's Original or Appellate Jurisdiction.

Five months before Hirota sought an original writ, the Court held in *Ahrens v. Clark* that federal district courts lacked statutory authority to issue the writ to those imprisoned outside their territorial jurisdiction. 335 U.S. 188, 192 (1948). After *Ahrens*, Hirota and his co-petitioners believed they needed to proceed *directly* here. Brief of Pet'r at 2, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239) ("Had it not been for

the decision in *Ahrens v. Clark* . . . the petitioner might have filed a petition for Writ of Habeas Corpus in the District Court. . . ."). Counsel repeated this position at oral argument. Tr. of Record at 19, *Hirota*, 338 U.S. 197 (No. 239).

Under Article III, however, this Court has only two species of jurisdiction: original and appellate. U.S. Const. art. III, § 2, cl. 2. "Original" subject matter jurisdiction in the Supreme Court is limited to "cases affecting ambassadors, public ministers, and consuls, and other cases in which a State is a party." *Id.*; *Ex parte Siebold*, 100 U.S. 371, 374-375 (1879); *accord Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-176 (1803). The Court in *Hirota* clearly lacked original jurisdiction.

Yet the Court also had no appellate jurisdiction. Under the Regulations and Exceptions Clause, U.S. Const. art. III, § 2, cl. 2, the Court's appellate jurisdiction is dependent upon statute, and the Court may issue a writ of habeas corpus only where it has the statutory power to review the decision of some lower tribunal. *See Ex Parte Bollman*, 8 U.S. (4 Cranch) 75, 101 (1807)(Marshall, C.J.)(exercising statutory authorization to issue writ of habeas corpus in aid of Court's appellate jurisdiction over lower federal court); *see also Felker v. Turpin*, 518 U.S. 651, 667 n.1 (1996)(Souter, J., concurring). Plainly, Congress had given the Court no power to review the "judgments and sentences" of the IMTFE.

Lacking either appellate or original jurisdiction, the Court had no choice but to rule as it did, denying Hirota and his co-petitioners leave to file, and leaving them no federal forum. *Hirota*, 338 U.S. at 198. But the *Ahrens* rule has not survived. Today the district court has jurisdiction over a citizen detained abroad so long as an ultimate custodian is subject to the court's command. *See, e.g., Rumsfeld v. Padilla*, 542 U.S. 426, 435-436 nn.8-9 (2004); *Braden*, 410 U.S. at 498. Here, the ultimate custodian is concededly the Secretary of the Army, located in the District of Columbia, where Omar and Munaf began this litigation.[23]

2. The Petitioners in *Hirota*, Unlike Omar and Munaf, Sought Collateral Review of the "Judgment and Sentences" of a Foreign Tribunal.

Even if the petitioners in *Hirota* had been within the Court's Article III jurisdiction, their suit would still have failed since they challenged the creation, composition, and workings of the IMTFE. Omar and

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[23] In the courts below, the government responded that *Hirota* makes no specific mention of original or appellate jurisdiction. In subsequent cases, however, the Court denied leave to file petitions like the one filed by Hirota explicitly because the Court lacked original jurisdiction. *See, e.g., Ex parte Betz*, 329 U.S. 672, 672 (1946)(denying leave to file original habeas application "for want of original jurisdiction"); *Everett v. Truman*, 334 U.S. 824 (1948)(same); *In re Dammann*, 336 U.S. 922, 923 (1949)(same); Fallon, et al., *The Federal Courts and the Federal System* 316 (5th ed. 2003)(collecting cases).

Munaf, by contrast, challenge the legality of detention at the hands of their own government. Their petitions, unlike the petitions in *Hirota*, fall into the "historical" heartland of habeas "as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301.

As the Court in *Hirota* properly perceived, the IMTFE was "not a tribunal of the United States." It was the product of lengthy diplomatic negotiations beginning with the Potsdam Agreement of July 26, 1945, continuing during the Moscow Conference of late December 1945, and culminating in the creation of the Far Eastern Commission, a group that included representatives from eleven nations and that authorized the establishment of the IMTFE in April 1946. *See* Documentary App. at 1-3, 14-22, 31-46, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(Nos. 239, 240, 248).

In their petition, Hirota and his fellow petitioners leveled three charges against the IMTFE: that General MacArthur exceeded his constitutional authority when he created the tribunal; that the predicate acts for conviction were "beyond the scope and purview of the Japanese instrument of surrender"; and that the commission deprived them of the rights essential to a fair trial. *See* Pet'n for Writ of Habeas Corpus at 29, 30, 34, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239); Brief of Pet'r at 18-22, *Hirota*, 338 U.S. 197 (No. 239)(alleging various procedural errors during the IMTFE proceedings).

In short, they asked the Court to scrutinize the legitimacy and operation of a foreign court. But it is axiomatic that an American court does not provide collateral review of proceedings in a foreign tribunal. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 700 (2004). The American judiciary, therefore, simply had "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." *Hirota*, 338 U.S. at 198.[24]

Omar and Munaf, by contrast, make no challenge to any Iraqi or foreign tribunal. As the Court of Appeals in *Omar* understood, they "seek[ ] not to collaterally attack a final international conviction, but only to test the lawfulness of [their] extrajudicial detention in Iraq, where [they have] remained in the control of U.S. forces for over two years without legal process." *Omar*, 479 F.3d at 8. And to the extent

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[24] The government points out that the petitioners in *Hirota* were in the custody of General Douglas MacArthur, who, it is said, was "under the direct command and control of the United States." G. Br. 19-20. As noted earlier, however, the Solicitor General in *Hirota* argued precisely the opposite, insisting that no officer in the country, including General MacArthur, could order "the release of the prisoners." Tr. of Record at 50, *Hirota v. MacArthur*, 338 U.S. 197 (1948)(No. 239); *see supra*, 25 n.14. Even if the government's revisionist view of history were correct, it would not alter the result. MacArthur's status as a U.S. soldier did nothing to bring the case within the Court's original or appellate jurisdiction; could not transform the petitioners' allegations into something other than an attack on the "judgments and sentences" of a foreign tribunal; and did not convert the petitioners from enemy aliens to American citizens.

federal officials seek to transfer them to Iraqi custody, they challenge the lawfulness of their own government's decisions, not Iraqi action. *Hirota*, therefore, simply does not apply.[25]

Recognizing that Munaf and Omar do not challenge a foreign judgment, the government makes an unconvincing eleventh-hour attempt to liken the three-person screening panels that apparently labeled them "security internees" and, in Omar's case, also an "enemy combatant," to the nearly two-year trial conducted by the IMTFE and at issue in *Hirota*. The Court should reject this argument.

Omar and Munaf challenge their detention by U.S. officers, not the result of some extra-record screening process. The government pointedly does not suggest the proceedings of the screening panels, which took place without counsel, satisfied the Due

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[25] Nor does the *Hirota* bar to collateral challenges impede Munaf's inquiry into the key role that Lieutenant Pirone played in initiating the Iraqi proceedings against him. The government concedes that Pirone did so but says it was at Romania's behest. G. Br. 10 n.3. Romania, however, has formally, publicly, and repeatedly disavowed any such delegation of authority. *See supra*, 12-13 & n.8. Without questioning the Iraqi process, Munaf assuredly is entitled to question whether a U.S. official used false pretenses to secure the foreign prosecution that Respondents now proffer in their defense. *Cf. In re Burt*, 737 F.2d 1477, 1484 (7th Cir. 1984)("[The government] must, in carrying out its treaty obligations, conform its conduct to the requirements of the Constitution. . . .").

Process Clause. If the government makes such an argument on remand, Munaf and Omar will respond as needed, and the lower court will take the measure of these proceedings against the requirements of the Fifth Amendment. *Hamdi*, 542 U.S. at 538 (plurality op.); *see* Part II, *infra*.[26]

In short, these cases are direct challenges to U.S. detention at a U.S. prison, not collateral challenges to the workings and results of a multinational tribunal.

3. The *Hirota* Petitioners, Unlike Omar and Munaf, Were Enemy Aliens Who Did Not Enjoy the Privilege of Litigation in American Courts.

Finally, unlike Hirota and his co-petitioners, Omar and Munaf are American citizens who enjoy a status "meant to have significance in the structure of

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[26] The government claims the process employed by these panels exceeded the requirements of Article 5 of the Geneva Conventions. G. Br. 5. As the court below in *Omar* pointed out, however, "the record . . . reveals little about the panel's operation." 479 F.3d at 3. Because counsel for Omar and Munaf was finally allowed to meet with his clients in January 2008, on remand the habeas petitioners will describe how these panels actually functioned, as opposed to the fulsome description given by the government. Finally, the government calls this proceeding an "MNF-I tribunal." G. Br. 5. As with every point in its brief where it describes MNF actors, the tribunal consisted only of American soldiers. Tr. of Oral Argument at 31-32, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126).

our government." *Ambach v. Norwick*, 441 U.S. 68, 75 (1979). In this regard – and quite independently of other considerations – their habeas actions stand on wholly different footing from Hirota's.

The government devalues the "'priceless treasure'" of citizenship, *Fedorenko v. United States*, 449 U.S. 490, 507 (1981)(citation omitted), pointing out that *Hirota* does not specifically rely on alienage. G. Br. 31-36. But this makes far too much of far too little. The brief *per curiam* in *Hirota* does barely more than describe the petitioners – "residents and citizens of Japan." 338 U.S. at 198. *Hirota* did not address whether citizenship *alone* could provide the basis for jurisdiction when U.S. officials detain a person overseas. In his later-filed concurrence, Justice Douglas warned that the *per curiam* should not be read to stand for more than it could bear. *Id.* at 202 (Douglas, J., concurring)("If no United States court can inquire into the lawfulness of [an American citizen's] detention, the military have acquired, contrary to our traditions . . . a new and alarming hold on us.").[27] The

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[27] And in fact, during the following Term, the Court heeded Justice Douglas' admonition. In 1949, several U.S. citizens imprisoned by the military in Germany sought leave to file habeas petitions directly in this Court. Because they were beyond the Court's original and appellate jurisdiction, the Court denied the motion. *In re Bush*, 336 U.S. 971, 971 (1949)(mem.). But unlike in *Hirota*, which concluded that no American court had "power or authority" over the prisoners, the Court in *Bush* denied the motions "*without prejudice to the right to apply to any appropriate court that may have jurisdiction.*" *Id.* (emphasis added). Bush promptly re-filed his petition in the District Court

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brief filed by the government in this case shows that Justice Douglas' warning was "prescient." *Omar v. Harvey*, 416 F. Supp. 2d 19, 24 n.7 (D.D.C. 2006).

In any case, whatever ambiguity lingered on this score after *Hirota* was dispelled two years later in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), where the Court rejected the Solicitor General's argument that *all* prisoners incarcerated by the military overseas – whether citizen or alien – had no right to challenge their detention in habeas. *See* Brief of Pet'r at 14-15, *Johnson v. Eisentrager*, 339 U.S. 763 (1950)(No. 306). The Court rejected this position:

> Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection.

Eisentrager, 339 U.S. at 769-770.[28] Since *Eisentrager*, no appellate court in the country has held that a U.S. citizen imprisoned by the military overseas was

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for the District of Columbia, which exercised jurisdiction. *In re Bush*, 84 F. Supp. 873 (D.D.C. 1949).

[28] The government suggests that the Court cannot really mean what it said in *Eisentrager* since the language, at least as the government reads it, implies that U.S. citizens could challenge detention by a foreign government. G. Br. 32. But *Eisentrager* said no such thing, and obviously did not mean to alter the requirement that the custodian be subject to the Court's command.

beyond the habeas jurisdiction of the federal courts – until the decision below in *Munaf*.[29]

E. Complying With the Rule of Law Will Not Embarrass the United States.

Finally, the government argues that allowing American citizens to challenge their detention at the hands of American soldiers at an American prison would somehow embarrass America before her allies. G. Br. 26. This is a variant of the argument pressed below that the habeas applications should be dismissed because determining the lawfulness of a citizen's detention is a "political question."[30] Repackaging this argument makes it no more convincing.

The government attempts to oust jurisdiction with the specter that "courts of other nations" might also exercise jurisdiction with conflicting results. G. Br. 26. But as we have noted, international law already provides a clear rule for distributing jurisdiction when nations act in coordination. *See* Int'l Law

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[29] And even then, only reluctantly. *See Munaf v. Geren*, 482 F.3d 582, 584 (D.C. Cir. 2007)("[W]e do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens.").

[30] The government's arguments about foreign affairs, military discretion, and the absence of manageable standards echo the political question arguments pressed and rejected in *Hamdi*. 542 U.S. at 535 (plurality op.)(rejecting "assertion that separation of powers principles mandate a heavily circumscribed role for the courts").

Comm'n, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and 7 Adopted by the Drafting Committee*, art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004). The "effective control" rule is not only congruent with the bounds of habeas jurisdiction, *see supra*, 21-26, it also guards against conflicts of jurisdiction and prevents "black holes" that are anathema to international law. Applying this rule, the British House of Lords recently held that the U.K., not the U.N., was responsible for adjudicating the propriety of the detention of a British citizen by British MNF-I forces in Iraq. *R. (on the application of Al-Jedda) v. Sec'y of State for Def.*, [2007] U.K.H.L. 58. No international outcry accompanied this decision.

In any event, the fear that an over-strong attachment to the rule of law will embarrass the United States cannot be a basis to deprive citizens of their liberty. This amounts to the contention that while the Commander in Chief cannot suspend the Writ, the Security Council can. The Constitution admits of no such construction.

II. The District Court Did Not Abuse Its Discretion by Entering a Narrowly Tailored Standstill Junction.

The government argues next that no preliminary injunction, however narrow, could be entered in this case. G. Br. 38-51. But because the District Court has

jurisdiction, it also has the power to preserve it by freezing the status quo. *See* Fed. R. Civ. Pro. 65; *see also* 28 U.S.C. § 1651(a); *FTC v. Dean Foods Co.*, 384 U.S. 597, 603-604 (1966). Heated rhetoric about sheltering "alleged criminals" or hindering Iraqi courts not only mischaracterizes the narrow, *preliminary* order here, but also pointedly fails to address the constitutional challenges Omar and Munaf lodge against their detention and threatened transfer. G. Br. 40, 48-49.[31]

Omar and Munaf raise two claims that must be adjudicated on remand. The government cannot eliminate the district court's power to decide these claims – and ascertain the truth of the government's allegations – merely by declaring an intent to transfer.

First, Omar and Munaf challenge the lawfulness of their detention under the Due Process Clause. *See Hamdi*, 542 U.S. at 529 (plurality op.)(freedom from "physical detention by one's own government" is "the most elemental of liberty interests"); *id.* at 554-555 (Scalia, J., dissenting). They claim they are innocent

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[31] The government's argument regarding the injunction is *de facto* an effort to dismiss. *Cf. McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 867 n.15 (2005). The Court hence "accept[s] as true all material allegations [of the habeas petitioners]," *Nat'l Wildlife Fed'n v. Buford*, 835 F.2d 305, 312 (D.C. Cir. 1987), and "review[s] the District Court's legal rulings *de novo* and its ultimate decision to issue the preliminary injunction for abuse of discretion," *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006).

civilians who have been held for years in U.S. custody. But even the government does not assert the power to detain innocent civilians. *See Hamdi*, 542 U.S. at 534 (plurality op.)(habeas "ensur[es] that the errant tourist, embedded journalist, or local aid worker has a chance to prove military error"). On remand, therefore, the District Court must hold *Hamdi* hearings to test the government's factual allegations. Hence, the government's suggestion that the standstill injunction "shelter[s] alleged criminals" seeks to displace the factfinding function of orderly district-court litigation with untested assertions in an appellate brief. Only the preliminary injunction, and the hearing it allows, will yield the truth behind the allegations against Omar and Munaf.[32]

Second, Omar and Munaf challenge the lawfulness of their detention for transfer to Iraqi authorities. Their challenge contains two strands: they challenge the government's legal authority to effect a transfer to Iraqi custody; and they claim that their transfer to likely torture would violate both statutory

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[32] On remand, the government may seek to rely on the determinations by the three-member screening panels as a "sufficient basis" for detention. G. Br. 21. But Omar and Munaf are entitled to challenge the process used to designate them for detention and transfer under the Due Process Clause. *Hamdi*, 542 U.S. at 538 (plurality op.)(courts must ensure "minimum requirements of due process are achieved"). These "tribunals," moreover, have not been subject to factual development, only naked government assertion. *Accord Omar*, 479 F.3d at 3; *supra*, 41 n.26.

and constitutional law. Preserving the status quo to allow adjudication of these complex factual and legal questions was surely no abuse of discretion.

The Due Process Clause protects citizens against transfer to foreign sovereigns absent statutory or treaty authority. In *Valentine v. United States ex rel. Neidecker*, the Court held that "[t]here is no executive discretion to surrender [a citizen] to a foreign government, unless that discretion is granted by law." 299 U.S. 5, 9 (1936); *accord* G. Br. 40-41. This holding takes root in "the liberty of the individual" sheltered by Due Process. *Valentine*, 299 U.S. at 9; *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852)(Catron, J.)("Public opinion had settled down to a firm resolve . . . that so dangerous an engine of oppression as secret proceeding before the executive, . . . and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country."). In addition, under settled law, the Due Process Clause applies overseas. *Reid*, 354 U.S. at 6.[33] Freedom from unlawful transfer is thus protected *wherever* the government seizes a citizen. On remand, therefore, the

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[33] Even before *Reid*, habeas availed when the government seized a petitioner and sought to send him to another country from the high seas. *See Chin Yow v. United States*, 208 U.S. 8, 12-13 (1908)("If we regard the petitioner . . . as if he had been stopped and kept at the limit of our jurisdiction . . . still it would be difficult to say that he was not imprisoned . . . when to turn him back meant that he must get into a vessel against his wish and be carried to China."); *United States v. Jung Ah Lung*, 124 U.S. 621, 626 (1888)(same).

government must identify a treaty or statute that permits it to transfer the habeas petitioners to Iraqi custody.

But no such authority exists. To the contrary, the 1936 extradition treaty between Iraq and the U.S. affirmatively bars the government from transferring Omar and Munaf. *See* Extradition Treaty, U.S.-Iraq, *signed* June 7, 1934, 49 Stat. 3380 ("Iraq-U.S. Treaty"). Article VIII of the Treaty, by its terms, prohibits a citizen's transfer. 49 Stat. at 3383; *see Valentine*, 299 U.S. at 15-16 (interpreting, contemporaneous to the Iraq-U.S. Treaty, identical language in extradition treaty with France to bar extradition of citizens). And under Article XI, the Treaty applies in "all territory wherever situated, belonging to either of the High Contracting Parties *or in the occupancy and under the control of either of them, during such occupancy or control*." 49 Stat. at 3383 (emphasis added). Since the United States concededly occupies and controls the territory where Omar and Munaf are held, the treaty provides the governing rule of decision.[34] The government thus cannot demonstrate the

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[34] Federal officials control Camp Cropper to the exclusion of Iraq. As the government concedes, Iraqi authorities may not enter and seize detainees from Camp Cropper without U.S. permission. Tr. of Oral Argument at 25-26, *Omar v. Harvey*, 479 F.3d 1 (D.C. Cir. 2007)(No. 06-5126). In addition, federal officials must decide independently whether they will transfer a detainee to Iraqi custody. G. Br. 39, n.10. Furthermore, the Security Council resolutions recognize that the United States is an occupying power, a status that continues until its effective control ends. S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22,

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legal predicate for a transfer, which compels the conclusion that no transfer of a U.S. citizen to Iraqi custody is permitted. *See also* Brief of *Amici Curiae* of M. Cherif Bassiouni et al.[35]

Nor can the Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 ("Iraq AUMF"), fill the gap. Extradition treaties are not superseded or nullified by the law of war. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 45 ¶ 5, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 3546, 75 U.N.T.S. 287, 316 (while some transfers are allowed, "extradition treaties concluded before the outbreak of hostilities" still provide a basis

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2003)(U.S. and U.K. undertake "the specific authorities, responsibilities, and obligations under applicable international law of these states as occupying powers . . . "); Benvenisti, *The International Law of Occupation* xiv-xv (rev. ed. 2004)(noting continuing application of occupation laws).

[35] The government claims that extradition is by definition a domestic procedure. This is not so. Historically, extradition was defined without reference to the locus of seizure. *See, e.g.*, 1 Moore, *A Treatise on Extradition and Interstate Rendition* 4 (1891)("[E]xtradition may be defined as the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed."); Spear, *The Law of Extradition, International and Inter-State* 70 (3d ed. 1885)(extradition is "the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction" (internal citation omitted)); *see also Sayne v. Shipley*, 418 F.2d 679, 682-84 (5th Cir. 1969)(describing extradition framework for Panama Canal Zone).

for enforcing "offences against ordinary criminal law"). And while the Iraq AUMF may permit battlefield captures and detention, it does not extend to detention or transfer to another sovereign for regular *criminal* prosecution. *See* Pejic, *Procedural principles and safeguards for internment/administrative detention in armed conflicts and other situations of violence*, 87 Int'l Rev. Red Cross 375, 381 & n.21 (2005)(noting that "internment/administrative detention" is "strictly separate" from "penal repression"); *see also Hamdi*, 542 U.S. at 518-519 (plurality op.)(looking to law-of-war sources to ascertain AUMF's scope).[36]

Moreover – and even if the government has statutory or treaty authority to transfer Omar or Munaf – federal officials nonetheless cannot transfer *any* U.S. citizen to likely torture. Omar and Munaf have rights under both the substantive component of the Due Process Clause and the FARR Act against transfers to likely torture. Section 2242(a) of the act provides that "[i]t shall be the policy of the United States not to expel, extradite, or otherwise effect the

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[36] Further, the government concedes it may transfer solely "individuals determined to be security internees" to Iraqi authorities. G. Br. 45. Thus, even if the AUMF provided legal authority for transfer, the District Court would still have to ascertain whether Omar or Munaf *in fact* qualify as "security internees" before a hand-over. Moreover, since the category of "security internee," like "[t]he legal category of enemy combatant[,] has not been elaborated upon in great detail," remand is necessary to ascertain the "permissible bounds of the category." *Hamdi*, 542 U.S. at 523 n.1 (plurality op.).

involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger . . . *regardless of whether the person is physically present in the United States.*" Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681-822 (emphasis added). The FARR Act, which covers Omar and Munaf, is routinely enforced in federal court.[37]

The record here contains unrebutted evidence that Omar and Munaf would be tortured in Iraqi custody. JA 151-153; *Omar*, 416 F. Supp. 2d at 23. Disregarding that proof, the government blithely asks the Court to accept on faith that it would not transfer a citizen to torture. G. Br. 47. Due process, however, contemplates *judicial* process, to which Omar and Munaf are entitled upon remand.[38]

In sum, the government cannot render habeas jurisdiction an empty vessel merely by proclaiming its intention to transfer a citizen overseas to foreign custody. For if the district court cannot issue a stand-still order, habeas jurisdiction is meaningless, and the government would achieve indirectly what it cannot directly: a "blank check . . . when it comes to the

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[37] *See, e.g., Auguste v. Ridge*, 395 F.3d 123 (3d Cir. 2005); *Cadet v. Bulger*, 377 F.3d 1173 (11th Cir. 2004); *Wang v. Ashcroft*, 320 F.3d 130 (2d Cir. 2003).

[38] *See Khouzam v. Hogan*, ___ F. Supp. 2d ___, No. 3:07-cv-0992-TIV, slip op. at 43-46 (M.D. Pa. Jan. 10, 2008)(contrary to government's suggestion, "consultation among members of the Executive Branch [about the risk of torture] . . . does not satisfy the constraint of the Fifth Amendment").

rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536. This Court should remand for the "prudent and incremental" process required to adjudicate these claims. *Id.* at 539 (plurality op.); *see also Ashcroft v. ACLU*, 542 U.S. 656, 664-665 (2004)("If the underlying constitutional question is close . . . we should uphold the injunction and remand for trial on the merits.").

III. The Court Should Reject the Government's Effort to Short-Circuit Judicial Review.

In the teeth of this authority, the government claims that *Wilson v. Girard*, 354 U.S. 524 (1957)(per curiam), the rule of non-inquiry, and speculation about final relief prevent *any* judicial inquiry into the legality of transfer to Iraqi custody. But *Wilson* supports the preliminary injunction, the rule of non-inquiry is not relevant, and errant speculation about final relief cannot be leveraged to close the courthouse door.

A. *Wilson* Supports Issuance of a Standstill Injunction.

In *Wilson*, an American serviceman stationed in Japan sought to bar his transfer to Japanese authorities. 354 U.S. at 525. The district court granted declaratory relief and an injunction against transfer. 152 F. Supp. 21, 27 (D.D.C. 1957). This Court granted both sides' petitions for certiorari. In this Court, Girard lodged two main arguments: that the U.S.-Japan

agreement enabling transfer was void because it lacked Senate authorization, Brief for Appellee 15-24, *Wilson v. Girard*, 354 U.S. 524 (1957)(No. 1103); and that "[u]nder International Law . . . visiting troops in a friendly sovereign's territory are immune from . . . criminal jurisdiction." *Id.* at 24 (citing *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)).

The Court rejected both arguments. It first highlighted the "Security Treaty" and the "Administrative Agreement covering . . . jurisdiction of the United States over offenses committed in Japan by members of the United States armed forces." *Wilson*, 354 U.S. at 526-527. The Court expressly noted that the Agreement "was considered by the Senate before consent was given to the Treaty," and held: "[W]e are satisfied that the approval of Article III of the Security Treaty authorized the making of the Administrative Agreement and the subsequent Protocol . . . governing jurisdiction to try criminal offenses." *Id.* at 528-529. Only then did the Court reject Girard's second argument, citing the passage in *Schooner Exchange* acknowledging a sovereign's prescriptive jurisdiction within its own territory.

Wilson, therefore, does not grant the government unfettered authority to seize and transfer citizens overseas to foreign custody. To the contrary, *Wilson* confirms the extraterritorial reach of the *Valentine* Due Process rule – *viz.*, that the government may not transfer a citizen without legal authority. *Accord Omar*, 479 F.3d at 10. Only after the Court "satisfied"

itself that such authority existed did it cite *Schooner Exchange* to reject Girard's second argument that visiting troops have immunity under *international* law. *Wilson*, 354 U.S. at 528-529. And, most importantly, the Court did not remotely suggest that it was an abuse of discretion for the District Court in *Wilson* to freeze the status quo while it resolved these complicated issues.

The government's reading of *Wilson* also contradicts *Schooner Exchange*'s holding that "public ships of foreign friendly powers" are immune from attachment in federal court within the United States. 11 U.S. at 141. For if the government were correct about the preclusive effect of Iraqi territorial jurisdiction here, *Schooner Exchange*'s rejection of plenary U.S. jurisdiction in U.S. territory was correspondingly incorrect.[39]

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[39] Nations always may exercise jurisdiction over their citizens abroad. *See The Apollon*, 22 U.S. (9 Wheat.) 362, 370 (1824)("The laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens."); 10 Annals of Congress 597 (1800)(Rep. John Marshall)("[T]he jurisdiction of a nation extends to the whole of its territory, and to its own citizens in every part of the world.").

Further, the government's readings of *Wilson* and *Schooner Exchange* implausibly treat Iraq's presumptive right to exercise prescriptive jurisdiction as nullifying an American citizen's right to Due Process.[40] Indeed, if the government were right, Iraq's plenary authority to prosecute crimes in its own territory would obviate the need for extradition hearings for suspects domestically.

But the government's reasoning improperly transforms *Schooner Exchange*'s reliance on a default rule of international law into a first principle of constitutional law. Justice Marshall expressly rested his holding on "general principles" of international law, i.e., on grounds that cannot justify derogation from constitutional rights. 11 U.S. at 135-136; *accord* Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 Sup. Ct. Rev. 179, 187. "[A] court may properly look to international law norms only where there is 'no controlling executive or legislative act.'" Brief for United States at 35, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)(No. 03-339) (quoting *The Paquete Habana*, 175 U.S. 677, 700 (1900)). If international law cannot trump a statute or executive order, *a fortiori* it cannot displace Due Process. That Iraq has authority to prosecute offenses does not mean the U.S. has power to dispense with its citizens' Due Process rights.

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[40] As noted, the United States maintains discretion to decline to hand over detainees to Iraqi authority. *See* G. Br. 39 n.10.

Unsurprisingly, therefore, lower courts since *Wilson* have consistently scrutinized the legal basis for U.S. citizens' overseas transfer. *See, e.g.*, *Williams v. Rogers*, 449 F.2d 513, 520-521 (8th Cir. 1971); *Stone v. Robinson*, 431 F.2d 548, 552-553 (3d Cir. 1970); *Smallwood v. Clifford*, 286 F. Supp. 97, 101 (D.D.C. 1968); *May v. Wilson*, 153 F. Supp. 688, 689-690 (D.D.C. 1956)(finding treaty authorizing transfer). Remand for a hearing on the merits is thus in harmony with federal-court practice.

In sum, a citizen does not forfeit Due Process "just because he happens to be in another land." *Reid*, 354 U.S. at 6 (plurality op.). And *Wilson* does not allow the government to deprive citizens of that liberty merely by expressing its intent to transfer them to another sovereign.

B. The Rule of Non-Inquiry Does Not Preclude Judicial Inquiry Into Habeas Petitioners' Likely Torture After Transfer.

The government also invokes the common-law "rule of non-inquiry" to suggest that courts have no role when it comes to the likely torture of a U.S. citizen. *See* G. Br. 46-47. But the rule of non-inquiry is inapplicable here. In the FARR Act, Congress displaced that common-law rule with a judicially enforceable prohibition on transfers to likely torture. *See Mironescu v. Costner*, 480 F.3d 664, 671 (4th Cir. 2007) (noting that "prior to the CAT and the FARR Act . . . individuals being extradited [were] not constitutionally

entitled to any particular treatment. . . . However, the FARR Act has now given petitioners the foothold that was lacking").[41] When Congress commands inquiry into another legal system before a transfer, a federal common-law rule such as the rule of non-inquiry must give way. *See, e.g., In re Artt*, 158 F.3d 462, 474-475 (9th Cir. 1998)(Article 3 of the 1985 U.S.-U.K. extradition treaty mandates inquiry into British judicial system). Courts, moreover, are well-equipped to answer "straightforward question[s] of whether a fugitive would likely face torture [since] . . . American courts routinely answer similar questions, including in asylum proceedings." *Mironescu*, 480 F.3d at 672.

Further, courts have recognized that the rule of non-inquiry does not apply to torture. *See, e.g., Rosado v. Civiletti*, 621 F.2d 1179, 1195 (2d Cir. 1980); *accord United States v. Kin Hong*, 110 F.3d 103, 112 (1st Cir. 1997); *In re Burt*, 737 F.2d 1477, 1487 (7th Cir. 1984); *Prushinowski v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984). Torture differs from the run-of-the-mill procedural variations between criminal justice systems, as the government implicitly concedes, G. Br. 47, because it eviscerates even the possibility of basic fairness.

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[41] With one exception, the authorities cited by the government predate the FARR Act. In the exception, *Prasoprat v. Benov*, the petitioner did not allege torture, and the Court warned: "the rule of non-inquiry does not prevent an extraditee who fears torture upon surrender to the requesting government from petitioning for habeas corpus review." 421 F.3d 1009, 1016 n.5 (9th Cir. 2005), *cert. denied*, 546 U.S. 1171 (2006).

C. The *Omar* Preliminary Injunction is Properly Tailored.

In a last-ditch effort to stave off judicial review, the government makes apocalyptic predictions about the consequences of a *final* injunction. Its arguments are speculative and unsupported. They were not articulated below. And they incorrectly treat the *preliminary* injunction here as if it were final.

Omar sought a standstill instruction only *after* the government stated it would transfer him to the CCCI without notice to the Court or opposing counsel. JA 132-135. (Munaf's case later demonstrated this to be no idle threat. JA 53-55). The injunction sought only to maintain the status quo. After ordering briefing on separation-of-powers concerns, Judge Urbina issued a narrowly crafted order. *See* 07-394, Pet. App. 59a.

The government suggests that the injunction blocks a true release. G. Br. 37-38. But Omar and Munaf do not seek to delay genuine release. They seek their liberty.[42] Transfer to Iraqi authorities for further detention, torture, or death, however, is hardly liberty.

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[42] In her partial dissent, Judge Brown acknowledged: "It may be true that [Omar] is likely to succeed on the merits *if all he seeks from his habeas petition is release with no additional protections,* but then the United States would be free to notify Iraqi officials of the time and place of his release. . . ." *Omar*, 479 F.3d at 18 (emphasis in original). Of course, release is all that is presently at issue.

The government also suggests that the injunction "prevent[s] the Iraqi courts from adjudicating." G. Br. 49. This too is mistaken. The preliminary injunction does not affect the Iraqi courts or constrain Iraqi officials. *See* 07-394, Pet. App. 59a (directing injunction against respondents and their agents, not Iraq's courts); *accord Omar*, 479 F.3d at 14 ("U.S. courts . . . have no authority to constrain the actions of Iraqi authorities. . . ."). The CCCI has authority to continue both investigative and trial phrases in a defendant's absence. *See* Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 Fla. J. Int'l L. 1, 55 & n.226 (2006). And in Munaf's case, the CCCI continues to act regardless of the stay currently in effect.

In fact, the government's argument depends on the far more extreme proposition that whenever the Executive is aiding foreign criminal proceedings, judicial superintendence of a transfer is ousted. This argument allows no logical distinction between domestic and extraterritorial transfers. For *any* habeas challenge to an extradition hinders and delays the handovers of even convicted persons to foreign custody. *See, e.g., Pettit v. Walshe*, 194 U.S. 205, 214, 220 (1904)(declining to transfer convicted fugitive). In this case, however, the "petition[s] merely cal[l] on the district court to determine whether [federal] officials are complying with American law." *Omar*, 479 F.3d at 14.

Finally, the government's overheated speculation about potential *final* relief falls far wide of the mark.

G. Br. 48-51. The question of final remedy arises only if the district court finds no lawful basis for detention and transfer. While the nature of any final relief is unripe, it clearly need not include a bar on "information-sharing" – an item floated first by the *Omar* dissent, not the government. In any event, the contours of an appropriate remedy depend on facts now unknown.

The government may decide, for instance, as it has already warned, to continue holding Omar or Munaf as "enemy combatants." G. Br. 22 n.5. Or it might charge them criminally. *See, e.g., Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006)(Kennedy, J., concurring in the denial of certiorari); *accord United States v. Abu Ali*, 395 F. Supp. 2d 338 (E.D. Va. 2005). And if habeas petitioners prove that any transfer would *in fact* result in torture, the government agrees it would not attempt a transfer. G. Br. 47. In sum, the government's premature claims about the infirmities of a hypothetical final injunction provide no sound basis to overturn a narrowly crafted preliminary injunction preserving the status quo and allowing merits adjudication.

In the end, the government's demand for an urgent new exception to orderly judicial review sheds more heat than light. In *Hamdi*, the Court foresaw an orderly, incremental process of litigation to adjudicate citizens' challenges to military detentions purportedly justified by national security. *See* 542 U.S. at 539-540 (plurality op.). Omar and Munaf have been in U.S.

military custody for years, and it is past time for that process to unfold.

CONCLUSION

The Court should affirm the Court of Appeals in *Omar*, reverse in *Munaf*, and remand both cases to the District Court for further proceedings.

Respectfully submitted,

JOSEPH MARGULIES*
MACARTHUR JUSTICE CENTER
NORTHWESTERN UNIVERSITY
SCHOOL OF LAW
357 East Chicago Avenue
Chicago, IL 60611
Telephone: (312) 503-0890

AZIZ Z. HUQ
JONATHAN HAFETZ
BRENNAN CENTER FOR JUSTICE
NEW YORK UNIVERSITY SCHOOL OF LAW
161 Avenue of the Americas, 12th Floor
New York, NY 10013
Telephone: (212) 998-6730

ERIC M. FREEDMAN
250 West 94th Street
New York, NY 10025
Telephone: (212) 665-2713

SUSAN L. BURKE
KATHERINE HAWKINS
BURKE O'NEIL LLC
4112 Station Street
Philadelphia, PA 19127
Telephone: (215) 487-6590

VINCENT MOCCIO
AMY HANF
ROBINS, KAPLAN, MILLER & CIRESI L.L.P.
2800 LaSalle Plaza
Minneapolis, MN 55402
Telephone: (612) 349-8500

Counsel for the Habeas Petitioners

**Counsel of Record*
February 21, 2008

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Nos. 07-394 and 06-1666

In the Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR

MOHAMMAD MUNAF, ET AL.

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

PAUL D. CLEMENT
Solicitor General
Counsel of Record

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
JONATHAN H. LEVY
LEWIS S. YELIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

Shawqi Omar and Mohammed Munaf are United States citizens who voluntarily traveled to Iraq, allegedly committed serious crimes there, were captured in an active combat zone by an international military force, and are being held under international authority and at the request of the Iraqi government by United States military personnel acting as part of that multinational military coalition. Munaf, a dual Iraqi-United States national, has also been tried and convicted by an Iraqi court of participation in a kidnapping-for-hire scheme in Iraq. Omar has not yet been tried by an Iraqi court because the district court preliminarily enjoined the multinational force from transferring him to Iraqi custody or allowing him to be tried in Iraqi courts.

The questions presented are:

1. Whether the United States courts have jurisdiction to entertain a habeas corpus petition filed on behalf of an individual such as Omar or Munaf challenging his detention by the multinational force.

2. Whether, if such jurisdiction exists, the district court in *Omar* had the power to enjoin the multinational force from releasing Omar to Iraqi custody or allowing him to be tried before Iraqi courts.

PARTIES TO THE PROCEEDINGS

The petitioners in No. 07-394 are Pete Geren, Secretary of the Army; William H. Brandenburg, Major General-Deputy Commanding General (Detainee Operations); and Timothy Houser, Lieutenant Colonel.

The respondents in No. 07-394 are Sandra K. Omar and Ahmed S. Omar, acting as next friends of Shawqi Ahmad Omar.

The petitioners in No. 06-1666 are Mohammed Munaf and Maisoon Mohammed, acting as next friend of Mohammed Munaf.

The respondents in No. 06-1666 are Pete Geren, Secretary of the Army; William H. Brandenburg, Major General-Deputy Commanding General (Detainee Operations); and Timothy Houser, Lieutenant Colonel.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statutory provisions involved 2
Statement 2
Summary of argument 12
Argument 16
I. United States courts lack authority to review the habeas claims of individuals held abroad by a multinational force pursuant to international authority .. 17
A. United States courts lack jurisdiction in these cases under the rule of *Hirota* 17
B. The jurisdictional limitation recognized in *Hirota* is supported by core separation-of-powers principles 23
C. Jurisdiction does not turn on whether a habeas petitioner has been convicted by a foreign tribunal 28
D. The *Hirota* rule operates independent of citizenship 31
II. United States courts lack authority to block the MNF-I from surrendering custody of Omar and Munaf to Iraqi authorities 36
A. The district court had no basis to frustrate Iraq's criminal jurisdiction over persons within its borders 38
1. Nations have criminal jurisdiction over persons within their borders, including United States citizens, unless they have waived that jurisdiction 38

Table of Contents—Continued: Page

2. The Executive does not need any affirmative statutory or treaty authorization to relinquish custody of Omar or Munaf in Iraq 40
3. Iraq has sovereign discretion to establish modes of trial and punishment for offenses within its borders 45
B. The injunction against providing information to Iraq or permitting Iraq to try Omar is especially improper 48
Conclusion 51

TABLE OF AUTHORITIES

Cases:

Ahmad v. *Wigen*, 910 F.2d 1063 (2d Cir. 1990) 46
Al-Bandar v. *Bush*, 127 S. Ct. 854 (2007) 36
American Ins. Ass'n v. *Garamendi*, 539 U.S. 396 (2004) 24
Bishop v. *Reno*, 210 F.3d 1295 (11th Cir.), cert. denied, 531 U.S. 897 (2000) 32
Braden v. *30th Judicial Circuit Ct.*, 410 U.S. 484 (1973) 34
Burns v. *Wilson*, 346 U.S. 137 (1953) 34
Cozart v. *Wilson*, 236 F.2d 732 (D.C. Cir.), vacated as moot, 352 U.S. 884 (1956) 44, 50
Department of the Navy v. *Egan*, 484 U.S. 518 (1988) .. 28
Dole Food Co. v. *Patrickson*, 538 U.S. 468 (2003) 29
Exxon Mobil Corp. v. *Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005) 30

Cases—Continued: Page

Fleming v. *Page*, 50 U.S. (9 How.) 603 (1850) 25
Flick v. *Johnson*, 174 F.2d 983 (D.C. Cir.), cert. denied, 338 U.S. 879 (1949) 20
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 24
Hirota v. *MacArthur*:
335 U.S. 876 (1948) 24, 25
338 U.S. 197 (1948) ..... *passim*
Holmes v. *Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972) 44, 45, 46, 47
Hussein, In re, 468 F. Supp. 2d 126 (D.D.C. 2006) 36
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 33
Keene Corp. v. *United States*, 508 U.S. 200 (1993) 29
Kinsella v. *Krueger*, 351 U.S. 470 (1956) 38, 43
Lopez-Smith v. *Hood*, 121 F.3d 1322 (9th Cir. 1997) 46
Madsen v. *Kinsella*, 343 U.S. 341 (1952) 34
McElroy v. *Gualiardo*, 361 U.S. 281 (1960) 34
Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537 (1824) 29
Neely v. *Henkel*, 180 U.S. 109 (1901) 31, 33, 46, 47
Prasoprat v. *Benov*, 421 F.3d 1009 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006) 46
Preiser v. *Rodriquez*, 411 U.S. 475 (1973) 36
Ramadan v. *Bush*, 127 S. Ct. 1512 (2007) 36
Rasul v. *Bush*, 542 U.S. 466 (2004) 33, 34, 35
Reid v. *Covert*, 354 U.S. 1 (1957) 38
Republic of the Phillipines v. *Westinghouse Elec. Corp.*, 43 F.3d 65 (3d Cir. 1994) 43
Requested Extradition of Smyth, In re, 61 F.3d 711 (9th Cir. 1995), amended by 73 F.3d 887 (9th Cir.), cert. denied, 518 U.S. 1022 (1996) 46

Cases—Continued: Page

Sea Containers Ltd. v. *Stena AB*, 890 F.2d 1205 (D.C. Cir. 1989) 27
The Schooner Exchange v. *McFadden*, 11 U.S. (7 Cranch) 116 (1812) 38
United States v. *Arizti*, 229 F. Supp. 53 (S.D.N.Y. 1964) 46
United States v. *Kin-Hong*, 110 F.3d 103 (1st Cir. 1997) 46
United States ex rel. Keefe v. *Dulles*, 222 F.2d 390 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955) 32
United States ex rel. Stone v. *Robinson*, 431 F.2d 548 (3d Cir. 1970) 44
United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 34
Valentine v. *United States ex rel. Neidecker*, 299 U.S. 5 (1936) 40
Williams v. *Rogers*, 449 F.2d 513 (8th Cir. 1971) 44
Wilson v. *Girard*, 354 U.S. 524 (1957) ..... *passim*
W.S. Kirkpatrick & Co. v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990) 46
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U.S. 579 (1952) 25

Treaties and statutes:

Extradition Treaty, *done* June 7, 1934, U.S.-Iraq, 49 Stat. 3380 41
Art. I, 49 Stat. 3380 41

Treaties and statutes—Continued: Page

Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498:

§ (3)(a), 116 Stat. 1501 ..... 25, 45

18 U.S.C. 3184 ..... 40, 42

18 U.S.C. 3190 42

22 U.S.C. 287 *et seq.* 24

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28 U.S.C. 2241(c)(3) 20

Miscellaneous:

M. Cherif Bassiouni, *International Extradition: United States Law and Practice* (4th ed. 2002) 42, 43, 50

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Miscellaneous—Continued: Page

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S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) 2

S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) <http://www.un.org/Docs/sc/unsc_resolutions07.htm> 3

Harry S. Truman, *Directive to the Supreme Commander for the Allied Powers* (Aug. 13, 1945) 19

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Airgram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 22, 1948) 19

Telegram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 24, 1948) 19

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In the Supreme Court of the United States

No. 07-394

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

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BRIEF FOR THE FEDERAL PARTIES

OPINIONS BELOW

The opinion of the court of appeals in No. 07-394 (07-394 Pet. App. 1a-39a) is reported at 479 F.3d 1. The opinion of the district court in that case (07-394 Pet. App. 40a-58a) is reported at 416 F. Supp. 2d 19. The opinion of the court of appeals in No. 06-1666 (06-1666 Pet. App. 1-9) is reported at 482 F.3d 582. The opinion of the district court in that case (06-1666 Pet. App. 10-38) is reported at 456 F. Supp. 2d 115.

JURISDICTION

In No. 07-394, the court of appeals entered judgment on February 9, 2007. The petition for rehearing was denied on May 24, 2007 (07-394 Pet. App. 61a-62a). On

August 15, 2007, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including September 21, 2007, and the petition was filed on that date. In No. 06-1666, the court of appeals entered judgment on April 6, 2007. The petition for a writ of certiorari was filed on June 13, 2007. In both cases, the jurisdiction of this Court rests on 28 U.S.C. 1254(1). As explained below, the government's position is that the United States courts lack jurisdiction over these habeas actions.

STATUTORY PROVISIONS INVOLVED

Pertinent provisions are reprinted in the appendix to the petition in No. 07-394 (07-394 Pet. App. 65a-67a).

STATEMENT

1. a. The Multinational Force-Iraq (MNF-I) is an internationally authorized entity consisting of military forces from approximately 27 nations, including the United States. 07-394 Pet. App. 100a-101a. The MNF-I operates in Iraq at the request of the Iraqi government and under United Nations (U.N.) Security Council resolutions authorizing it "to take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to" the resolutions. *Id.* at 74a (S.C. Res. 1546, ¶ 10, at 4, U.N. Doc. S/RES/1546 (June 8, 2004)); see *id.* at 82a. Pursuant to its U.N. mandate, the MNF-I operates under the "unified command" of United States military officers, *id.* at 74a, but it is legally distinct from the United States military, has its own insignia, and includes high-ranking

officers from other nations (for example, the second in command, Lt. Gen. William Rollo, is a British officer).[1]

Under the letters referenced in the U.N. resolutions, the MNF-I is charged with, among other tasks, detaining individuals where "necessary for imperative reasons of security." 07-394 Pet. App. 86a. A letter attached to the most recent U.N. resolution states that the Government of Iraq is "responsible for arrest, detention and imprisonment tasks," but that the MNF-I should also undertake those activities with "maximum levels of coordination, cooperation and understanding with the Government of Iraq." S.C. Res. 1790, Annex I, ¶ 4, at 6, U.N. Doc. S/RES/1790 (Dec. 18, 2007). Pursuant to the U.N. resolutions, the MNF-I holds detainees, including individuals like Omar and Munaf who have committed hostile or war-like acts, as security internees.

In addition, under the authority of the U.N. resolutions, the Government of Iraq and the MNF-I agreed that the MNF-I would maintain physical custody of individuals suspected of criminal activity in Iraq pending investigation and prosecution in Iraqi courts under Iraqi law, because, among other reasons, many Iraqi prison facilities have been damaged or destroyed in connection with the ongoing hostilities. See 06-1666 Pet. App. 12;

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[1] The MNF-I's authority is subject to periodic review and reconsideration by the U.N. Security Council. Most recently, the Security Council extended the MNF-I's mandate through December 2008, see S.C. Res. 1790, U.N. Doc. S/RES/1790 (Dec. 18, 2007) <http://www.un.org/Docs/sc/unsc_resolutions07.htm>. The President of the United States and the Prime Minister of Iraq recently announced that Iraq does not intend to request an additional extension of the MNF-I's mandate beyond 2008. *Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship Between the Republic of Iraq and the United States of America* (Nov. 26, 2007) <http://www.whitehouse.gov/news/releases/2007/11/print/20071126-11.html>.

J.A. 48. The MNF-I holds those individuals as security internees during Iraqi criminal proceedings. J.A. 48.

b. The Central Criminal Court of Iraq (CCCI) is an Iraqi court under Iraqi governance, staffed by Iraqi judges who apply Iraqi law. 07-394 Pet. App. 104a. The CCCI is divided into two chambers: an investigative court and a felony trial court. *Ibid.* The investigative court conducts an investigative hearing, during which witnesses present sworn testimony, to determine whether there is sufficient evidence to warrant a criminal trial. *Id.* at 104a-105a. If the investigative court determines that there is sufficient evidence to proceed, it forwards a report to the trial court and recommends charges. *Id.* at 105a. The trial court sits in panels of three judges, who review the evidence submitted by the investigative court and may take additional evidence in formal proceedings. *Ibid.* In both investigative and trial proceedings, a defendant is entitled to be represented by counsel. *Id.* at 105a-106a. The proceedings are open to the public.

The CCCI has heard hundreds of cases since the fall of the Hussein regime, and many of those cases have involved individuals detained by the MNF-I during the course of the proceedings. The proper functioning of the court has been a key concern of the MNF-I in promoting stability and security in Iraq, given that "[e]stablishing the rule of law is the cornerstone of a free and democratic society." Joseph Giordono, *Trying Insurgents in Iraqi Courts Seen as Big Step in Rebuilding Legal System*, Stars and Stripes, Dec. 26, 2004 <www.stripes.com/article.asp?section=104&article=25317&archive=true)> (quoting MNF-I officer).

2. a. Shawqi Omar is an American-Jordanian citizen who voluntarily traveled to Iraq in 2002. See 07-394 Pet.

App. 2a, 101a-102a. In October 2004, he was captured by MNF-I forces during a raid of his Baghdad home. The raid was part of an effort to target associates of Abu Musab al-Zarqawi, the former Al-Qaeda leader in Iraq. See *ibid.* Omar was found harboring an Iraqi insurgent and four Jordanian Jihadist fighters. *Id.* at 101a-102a. Upon their capture, the individuals seized with Omar stated that, while living in his home in Baghdad, they surveilled potential kidnap victims, conducted weapons training, and engaged in other insurgent cell activities. *Id.* at 102a. Those individuals, as well as Omar, also explained that Omar planned to use his fluency in English to entice foreigners to return to his home where they could be kidnapped and ransomed. *Ibid.* At the time of his capture, Omar had several weapons and explosive-making materials in his home. *Id.* at 103a.

Since his capture, Omar has remained in the custody of members of the United States armed forces operating as part of the MNF-I. See 07-394 Pet. App. 1a. Following Omar's capture, a three-member MNF-I tribunal "conducted a proceeding that exceeded the due process requirements of Article 5 of the Third Geneva Convention of 1949." *Id.* at 103a. Omar was present at the hearing and had an opportunity to make a statement and to call available witnesses. *Ibid.* The tribunal found that Omar was a security internee under the authority of the U.N. resolutions, *i.e.*, that he posed a threat to the security of Iraq, and that he was also an enemy combatant in the war on terrorism, *i.e.*, that he had committed hostile and war-like acts. See *ibid.* In August 2005, the MNF-I determined to refer Omar to the CCCI for inves-

tigation and criminal prosecution for offenses committed in Iraq. *Id.* at 3a-4a.[2]

b. In December 2005, before the MNF-I referred Omar to the CCCI, one of Omar's wives and a son filed this next-friend habeas corpus petition on Omar's behalf in the District Court for the District of Columbia. 07-394 Pet. App. 4a. The district court issued a preliminary injunction directing that "the respondents, their agents, servants, employees, confederates, and any persons acting in concert or participation with them, or having actual or implicit knowledge of this Order by personal service or otherwise, shall not remove [Omar] from United States or MNF-I custody." *Id.* at 59a.

The district court rejected the government's threshold contention that it lacked jurisdiction under *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam), in which this Court held that the United States courts lacked jurisdiction over habeas petitions filed by Japanese nationals held abroad by a multinational force—the Allied Powers—pursuant to international authority. *Id.* at 198. In so holding, the district court pointed to the fact that Omar (unlike the habeas petitioners in *Hirota*) is a United States citizen. 07-394 Pet. App. 47a-48a. In addition, pointing to Justice Douglas's concurring opinion in *Hirota*, the district court reasoned that the fact that

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[2] To date, the MNF-I has held three status review hearings for Omar. Omar had the same opportunity to be present, make a statement, and call witnesses at each hearing. At the second hearing, held in March 2007, some of the individuals who were seized with Omar recanted their previous statements implicating Omar in insurgent activities. The March 2007 MNF-I tribunal nevertheless found sufficient evidence to continue detaining Omar. The most recent MNF-I tribunal likewise determined in September 2007 that Omar should continue to be detained as both a security internee and an enemy combatant.

Omar was in the immediate custody of United States armed forces created jurisdiction. *Id.* at 52a.

The district court entered its order barring Omar's release from MNF-I custody on the ground that "any physical transfer of [Omar] may prematurely moot the case or undo this court's jurisdiction." 07-394 Pet. App. 55a. Although the court recognized that Omar's "appearance before the CCCI does not constitute an immediate transfer to the Iraqi authorities," the court nevertheless also barred the MNF-I from presenting Omar for any proceedings before the CCCI on the theory that Omar might be "presented to the CCCI and in that same day, be tried, convicted and transferred to the CCCI's jurisdiction." *Id.* at 56a; see *id.* at 59a-60a.

c. The court of appeals affirmed. 07-394 Pet. App. 1a-39a.

i. The court of appeals held that the district court properly exercised jurisdiction. The court of appeals recognized that the case is like *Hirota* in that Omar is being held "overseas" by a "multinational force," but it held, based on its reading of circuit precedent, that the basic jurisdictional limitation established by *Hirota* for individuals held abroad by multinational forces pursuant to international authority does not govern this case because Omar has not yet been convicted by Iraqi courts based on the alleged criminal offenses for which he is being held. 07-394 Pet. App. 11a, 12a-13a.

A panel majority also upheld the district court's injunction. 07-394 Pet. App. 20a-26a. Although the panel majority recognized that the district court lacked authority to enjoin Omar's outright release, *id.* at 20a, the panel majority nonetheless concluded that the district court properly enjoined Omar's transfer to Iraqi custody, his release accompanied by information sharing

with the Iraqi government that would enable Iraq to arrest Omar upon his release, and his prosecution by the Iraqi courts. *Id.* at 20a, 23a, 25a. The court reasoned that such steps were warranted to preserve the district court's jurisdiction to consider the legality of any transfer of Omar to Iraqi custody. *Id.* at 23a-24a.

ii. Judge Brown dissented. 07-394 Pet. App. 27a-39a. She joined the panel's threshold ruling on jurisdiction, but would have vacated the district court's injunction against transfer. *Id.* at 27a. Judge Brown concluded that the courts had no basis to enjoin a transfer that "means simply allowing Iraqi officials to arrest and take custody of a person who was captured in Iraq and has remained there continuously—something they undeniably have a right to do." *Id.* at 35a-36a.

Judge Brown also objected to the scope of the injunction, which prevents any coordination between the MNF-I and Iraqi authorities as to Omar. She explained that, especially because Iraq has "exclusive jurisdiction to punish offenses against its laws committed within its borders," a court cannot "enjoin the United States military from sharing information with an allied foreign sovereign in a war zone * * * with the deliberate purpose of foiling the efforts of the foreign sovereign to make an arrest on its own soil, in effect secreting a fugitive to prevent his capture." 07-394 Pet. App. 34a, 36a (quoting *Wilson* v. *Girard*, 354 U.S. 524, 529 (1957)). "Any judicial order barring this sort of information sharing in a military zone," Judge Brown explained, "would clearly constitute judicial interference in a matter left solely to Executive discretion." *Id.* at 33a.

Judge Brown concluded that the injunction upheld by the panel majority constitutes an "unprecedented" interference "in the decisions of sovereigns acting jointly

within the same territory," amounts to a clear "trespass" on Executive authority, and imposes a "substantial impairment to the Executive's ability to prosecute the war efficiently and to make good on its commitments to our allies." 07-394 Pet. App. 34a, 36a-37a, 38a.

3. a. In March 2005, Mohammad Munaf, a dual Iraqi-United States citizen residing in Romania, voluntarily traveled with several Romanian journalists to Iraq, ostensibly to serve as the journalists' translator and guide. J.A. 32-33. Shortly after their arrival in Iraq, the group was kidnapped and held captive for over two months. J.A. 33. After the captives were freed, MNF-I forces detained Munaf because they suspected that he was involved in the kidnapping. J.A. 43.

In July 2005, a tribunal of three MNF-I officers reviewed Munaf's status and detention. J.A. 44. Munaf was present at the hearing, and he had an opportunity to hear the basis for his detention, make a statement, and call immediately available witnesses. *Ibid.* The panel determined that Munaf was a security internee who should continue to be detained for imperative reasons of security, in accordance with the MNF-I's U.N. mandate. *Ibid.* The MNF-I subsequently referred Munaf's case to the CCCI for investigation and possible trial. *Ibid.*

Munaf admitted on camera, in writing, and in front of the Iraqi investigative court that he participated as an accomplice in the kidnapping for profit of the Romanian journalists. J.A. 46. Munaf also appeared as a witness against his accomplices, including his brother-in-law. J.A. 46-48. Munaf was represented by counsel of his choice at the hearings, and was afforded the opportunity to present evidence and call witnesses. J.A. 45-46, 61. The Iraqi investigative court determined that there was

sufficient evidence to proceed, and it referred the case to the trial court. J.A. 48.

During the trial before the CCCI, Munaf and his attorneys again had the opportunity to present evidence and call witnesses. 06-1666 Pet. App. 14. Munaf and his codefendants testified at trial and recanted the confessions they had made in the investigative court, alleging that Iraqis or Romanians had forced them to confess. J.A. 62. After considering the evidence gathered by the investigative court, taking the additional statements from the defendants, and hearing argument from the Iraqi prosecutor and multiple defense attorneys, the trial court found Munaf and his five codefendants guilty of kidnapping and sentenced them to death. J.A. 61-63.[3]

An automatic appeal to the Iraqi Court of Cassation is pending. See J.A. 64-65. In accordance with its U.N. mandate and arrangement with the Government of Iraq, the MNF-I is continuing to hold Munaf on behalf of the Iraqi government until the resolution of his appeal.

b. In August 2006, after the CCCI investigative hearing but before his trial and conviction by the CCCI, Munaf, through his sister as next friend, filed this habeas corpus action seeking, among other relief, his release from MNF-I custody and an order barring his transfer to Iraqi custody. 06-1666 Pet. App. 14. Munaf also sought a temporary restraining order to prevent his transfer to the Iraqi authorities. *Ibid.*

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[3] A United States military officer, who is a member of the MNF-I, appeared in the trial court at the request of the Romanian government to make a formal complaint against Munaf and his codefendants, as is customary under the inquisitorial system. J.A. 62-63. Weeks before he made the complaint, the officer filed with the trial court a formal letter from the Romanian Embassy authorizing him to make the complaint on Romania's behalf. J.A. 63.

The district court denied Munaf's motion for a temporary restraining order and dismissed his habeas action for lack of subject matter jurisdiction. 06-1666 Pet. App. 10-38. The court concluded that this case was controlled by *Hirota* because Munaf is "in the custody of coalition troops operating under the aegis of MNF-I, who derive their ultimate authority from the United Nations and the MNF-I member nations acting jointly," as well as in the "constructive custody of the Republic of Iraq, which is seized of jurisdiction in the criminal case against him." *Id.* at 22. The district court rejected Munaf's attempt to distinguish *Hirota* on the ground that he is a United States citizen. *Id.* at 24-25. The court explained that *Hirota* turned on the fact that the petitioners were held in custody under international, and not United States, authority, and that the source of authority does not change with citizenship. *Id.* at 25.

c. The court of appeals affirmed. 06-1666 Pet. App. 1-9.

i. The court held that dismissal was required by *Hirota* because neither the MNF-I nor the CCCI is "a tribunal of the United States." 06-1666 Pet. App. 2, 3-4. Like the district court, the court of appeals explained that "*Hirota* did not suggest any distinction between citizens and noncitizens who were held abroad pursuant to a judgment of a non-U.S. tribunal." *Id.* at 4. Rather, based on the court of appeals' decision in *Omar*, the court stated that "the critical factor in *Hirota* was the petitioners' convictions by an international tribunal." *Ibid.* (quoting 07-394 Pet. App. 12a). "As in *Hirota*," the court explained, "Munaf's case involves an international force, detention overseas, and a conviction by a non-U.S. court." *Ibid.* "[C]onducting habeas proceedings in the face of such [an international] conviction," the court con-

tinued, "risks judicial second-guessing of a non-U.S. court's judgments and sentences." *Id.* at 4-5.

ii. Judge Randolph concurred in the judgment. 06-1666 Pet. App. 7-9. He concluded that the district court had jurisdiction because Munaf "is an American citizen * * * held by American forces overseas," but he would have denied the habeas petition and request for an injunction against transfer on the merits. *Ibid.*

Judge Randolph concluded that the case is governed by *Wilson* v. *Girard*, *supra*, in which this Court set aside an injunction against the transfer of an American soldier within Japan to Japanese authorities to face charges stemming from a shooting in Japan. In *Wilson*, Judge Randolph explained, this Court reaffirmed that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." 06-1666 Pet. App. 9 (quoting *Wilson*, 354 U.S. at 529). Judge Randolph concluded that *Wilson* compels dismissal of Munaf's habeas action and request for an injunction against transfer. See 06-1666 Pet. App. 9.

SUMMARY OF ARGUMENT

The United States courts lack jurisdiction to review habeas petitions filed on behalf of individuals held by a multinational force abroad pursuant to international authority. This Court laid down that jurisdictional rule in *Hirota* v. *MacArthur*, *supra*, and that rule suffices to dispose of these cases. But even if the Court were to overrule *Hirota*, it would still be error to enter relief, like that granted in *Omar*, that would interfere with the foreign sovereign's efforts to prosecute individuals for criminal conduct within its borders.

I. The threshold jurisdictional question in these cases is governed by *Hirota*. That case establishes that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force. Because individuals held pursuant to international authority are not "in custody under or by color of the authority of the United States," the writ of habeas corpus does not extend to them. 28 U.S.C. 2241(c)(1). In *Hirota*, this Court held that the United States courts lacked jurisdiction to review habeas petitions filed by Japanese nationals who were held by United States forces, acting as part of the Allied Powers, pursuant to the judgment of an international tribunal. So too here, Omar and Munaf are held overseas pursuant to international authority by United States forces acting as part of a multinational force. That multinational force is acting at the request of the Government of Iraq and pursuant to U.N. resolutions, and it is holding Munaf and Omar pursuant to a determination by a tribunal convened under such international authority and, in Munaf's case, a conviction by an Iraqi court.

The exercise of habeas jurisdiction in these cases not only would contravene this Court's decision in *Hirota*, but would interfere with the Executive Branch's solemn international commitments and its ability to carry out its foreign policy and military objectives. Other nations would inevitably take offense if American courts were to assume the authority to review the determinations of international bodies in which United States forces or personnel may participate abroad, and if the United States courts assume such jurisdiction, the courts of other nations could do so as well. These concerns are

magnified by the fact that the United States courts would be reviewing detention determinations made, not unilaterally by the United States, but by the MNF-I and (especially in Munaf's case) by the Iraqi government.

The court of appeals erred in restricting *Hirota*'s holding to detainees (like Munaf) who have already been convicted of criminal offenses by a foreign or international tribunal. As Munaf's own counsel acknowledges, nothing in *Hirota*'s rationale supports such a "criminal conviction" limitation. Such a rule would also lead to anomalous results. In particular, it would mean that the existence of jurisdiction could fluctuate depending on the course of foreign criminal proceedings, and it would create a perverse incentive for United States courts to intervene prematurely to "preserve" their asserted jurisdiction by enjoining foreign courts from exercising their undoubted jurisdiction over persons within their borders, as the district court did in *Omar*.

II. Even if the Court were to not heed principles of *stare decisis* and overrule *Hirota*, it should still overturn the district court's extraordinary injunction against (1) transferring Omar to Iraqi custody, (2) sharing with the Iraqi government details concerning any decision to release him, and (3) allowing him to appear before the Iraqi courts to answer for alleged crimes committed in Iraq. That injunction represents an unprecedented intrusion on a foreign sovereign's jurisdiction over alleged criminal offenses committed within its borders and the Executive's own foreign policy and military objectives.

This Court long ago settled that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson*, 354 U.S. at 529. *Wilson* forecloses the argument

that any *affirmative* statutory or treaty authorization is required to surrender custody of a United States citizen to a foreign sovereign when, as here, the individual is being held in the foreign country. Instead, *Wilson* puts the onus on the habeas petitioner to identify a statute or treaty *barring* such a transfer. Where there is no statute or treaty barring transfer, *Wilson* establishes that the United States courts lack authority to frustrate the jurisdiction of foreign sovereigns to bring individuals to justice for criminal offenses committed within their borders. Extradition case law is not to the contrary, because *Wilson*, like this case, does not involve an extradition of an individual from one country to another, but instead the transfer of an individual *within* a country.

Because no statute or treaty bars the transfer of Omar to Iraq, *Wilson* controls and requires that the district court's injunction be set aside. Indeed, that conclusion is even stronger here than in *Wilson*. The MNF-I detained Omar and Munaf in wartime pursuant to its international authority to assist the Government of Iraq by partnering and coordinating with Iraqi security forces. Surrendering Omar and Munaf to Iraqi authorities to answer for criminal conduct in Iraq would directly advance the important international mission embodied by both the U.N. resolutions authorizing the multinational force and the MNF-I's arrangements with the Government of Iraq. Moreover, there not only is no statutory or treaty *barrier* to transferring Omar and Munaf to Iraqi authorities, but both United States law and the U.N. resolutions affirmatively authorize such a transfer.

The other aspects of the unprecedented injunction upheld in *Omar* are even more problematic under the principles discussed above and underscore the extent to

which the courts below intruded on core Executive responsibilities and international comity. Indeed, the error of the district court's injunction is exposed by the court of appeals' felt need to hold that, if the MNF-I releases Omar, it may not provide Iraqi authorities with information that would enable them to arrest him. The court of appeals recognized that release from custody in Iraq without such an unprecedented order would be little different from transfer in light of the Iraqi government's obvious interest in detaining Omar. That fact should have underscored the unavailability of habeas and the inappropriateness of an injunction. Instead, the court of appeals took the extraordinary step of limiting the ability of a multinational force to notify Iraqi authorities of the location of the release of a dangerous individual in Iraq. That injunction in effect puts the United States courts in the position of secreting a fugitive from Iraqi justice, and it directly intrudes on core Executive interests and security concerns in an active theater of combat.

Likewise, there is no basis for preventing the Iraqi courts from trying Omar while he *remains* in MNF-I custody. If the Iraqi courts were to convict Omar, that would only underscore the absence of any basis for a United States court to interfere with Iraq's sovereign interest in bringing him to justice for offenses committed in Iraq. But the possibility that Omar will be convicted for his actions in Iraq provides no basis for an American court to interfere with such foreign proceedings.

ARGUMENT

These cases present two distinct questions of exceptional importance to the separation of powers, the Na-

tion's conduct of foreign and military affairs, and the sovereign prerogative of foreign nations to try individuals for the commission of criminal offenses within their own borders. First, whether the United States courts have jurisdiction to review a habeas petition filed on behalf of a United States citizen held by a multinational force abroad pursuant to international authority. Second, if such jurisdiction exists, whether the United States courts have the power to enjoin the transfer of such an individual from the multinational force to the foreign sovereign so that he may stand for prosecution or serve his punishment for offenses committed in that foreign land. As explained below, this Court should hold that the United States courts lack jurisdiction over such a habeas action. At a minimum, even if such jurisdiction exists, the Court should hold that the United States courts lack authority to enter the type of injunction upheld by the court of appeals in the *Omar* case.

I. UNITED STATES COURTS LACK AUTHORITY TO REVIEW THE HABEAS CLAIMS OF INDIVIDUALS HELD ABROAD BY A MULTINATIONAL FORCE PURSUANT TO INTERNATIONAL AUTHORITY

A. United States Courts Lack Jurisdiction In These Cases Under The Rule Of *Hirota*

The threshold jurisdictional question in these cases is governed by this Court's decision in *Hirota*, which establishes that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force. Because individuals held pursuant to international authority are not "in custody under or by color of

the authority of the United States," the writ of habeas corpus does not extend to them. 28 U.S.C. 2241(c)(1).

1. In *Hirota*, this Court considered whether the "courts of the United States" (338 U.S. at 198) had jurisdiction to review petitions for writs of habeas corpus filed by Japanese citizens who were being held in Japan by a multinational force pursuant to international authority. The habeas petitioners alleged that they were "in custody under and by color of the authority of the United States" and in violation of the Constitution and laws of the United States. Mot. for Leave to File Pet. for Writ of Habeas Corpus at 25-26, *Hirota*, *supra* (No. 239, Misc.) (*Hirota* Mot.). The petitioners were in the custody of United States military personnel abroad acting as part of a multinational force—the Allied Powers. Specifically, the petitioners were held in the custody of the "Commanding General of the United States Eighth Army who held them pursuant to the orders of [General] MacArthur, Supreme Commander of the Allied Powers." *Hirota*, 338 U.S. at 199 (Douglas, J., concurring).

The *Hirota* petitioners were being "held in [such] custody pursuant to the judgment of a military tribunal in Japan." 338 U.S. at 198. The petitioners had been convicted by the International Military Tribunal for the Far East, a court established by General MacArthur acting "as an agent of the Allied Powers." *Ibid.*; *id.* at 199 (Douglas, J., concurring). Authorization to establish the tribunal came from an international body, the Far Eastern Commission. *Id.* at 206. After the *Hirota* petitioners were convicted and sentenced by the tribunal, they appealed to General MacArthur, who declined to intervene in the judgment and directed the Command-

ing General of the Eighth Army to execute some of the petitioners.[4]

At all times, "the chain of command from the United States to the Supreme Commander [was] unbroken." *Hirota*, 338 U.S. at 207 (Douglas, J., concurring). President Truman had designated General MacArthur to be the Supreme Commander. Harry S. Truman, *Directive to the Supreme Commander for the Allied Powers* (Aug. 13, 1945), *in* Suppl. to Documentary App. at 4, *Hirota*, *supra* (No. 239, Misc.). And the Far Eastern Commission was required "to respect the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces." *Hirota*, 338 U.S. at 206 (Douglas, J., concurring) (internal quotation marks omitted).

In considering whether the Court had authority to review the habeas petitions at issue, the Court focused on the source of authority pursuant to which the petitioners were being held. Because the Court was "satisfied that the tribunal sentencing these petitioners [was] not a tribunal of the United States," it held that "the courts of the United States ha[d] no power" to adjudicate the habeas petitions. *Hirota*, 338 U.S. at 198. The facts that (1) the petitioners were being held in the immediate custody of an American officer (acting as part of the multinational force), (2) the tribunal that convicted the petitioners had been established by a United States military officer under the direct command and

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[4] See *Hirota* Mot. 25; Airgram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 22, 1948), *in* 6 U.S. Dep't of State, *Pub. No. 8681, Foreign Relations of the United States, 1948*, at 897-898 (1974) (*Foreign Relations*); Telegram from the Acting Political Advisor in Japan to the Secretary of State (Nov. 24, 1948), *in* 6 *Foreign Relations* 908.

control of the United States, and (3) the tribunal's rulings were subject to modification by that same United States military officer did not alter the Court's conclusion that jurisdiction was lacking. The crucial point, in the Court's view, was that, when General MacArthur established the relevant tribunal, he was "acting as" the Commander and agent of the Allied Powers, and therefore was acting under international authority (and not solely United States authority). *Ibid.*

As the District of Columbia Circuit observed shortly after *Hirota* was decided, the key to *Hirota*'s jurisdictional rule is the "source of [the] power" pursuant to which an individual is held. *Flick* v. *Johnson*, 174 F.2d 983, 984, cert. denied, 338 U.S. 879 (1949). That conclusion squares with the text of the habeas statute, which provides, in pertinent part, that "[t]he writ of habeas corpus shall not extend to a prisoner unless * * * [h]e is in custody *under or by color of the authority of the United States*." 28 U.S.C. 2241(c)(1) (emphasis added). Because an individual who is held abroad pursuant to international authority (and not solely United States law) is *not* "in custody under or by color of the authority of the United States," the writ of habeas corpus does not extend to such a detainee.

The habeas corpus statute also states that the writ does not extend to a prisoner unless "[h]e is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2241(c)(3). That provision, however, presumes that an individual is "in custody" under United States—not international—authority. Indeed, the *Hirota* petitioners alleged that they were being held "in custody in violation of the constitution, treaties, international engagements, and laws of the United States." *Hirota* Mot. 26. Yet in *Hirota* this

Court held that jurisdiction was lacking because they were held pursuant to a judgment of an international tribunal. 338 U.S. at 198. A contrary construction would open the United States courts to habeas claims filed by or on behalf of individuals held the world over pursuant to foreign judgments or laws.

2. The basic teaching of *Hirota* calls for dismissal of these cases. Here as in *Hirota*, the habeas petitioners are in the physical custody of United States military officers, but those officers are acting as part of a multinational force under international authority and holding the petitioners pursuant to a determination by a tribunal convened under such international authority.

At the request of the Government of Iraq (see p. 2, *supra*), the U.N. authorized the multinational force to operate in Iraq and to "take all necessary measures to contribute to the maintenance of security and stability in Iraq in accordance with the letters annexed to" U.N. Resolution 1546. 07-394 Pet. App. 74a. As one of those letters explains, that mandate includes "internment [of individuals within Iraq] where this is necessary for imperative reasons of security." *Id.* at 86a. Under the authority of the U.N. resolutions, the MNF-I agreed with the Government of Iraq that the MNF-I would "maintain[] physical custody of detainees while their cases are being heard by the CCCI." *Id.* at 106a.

Omar and Munaf are currently held under that authority pursuant to the determinations of three-member MNF-I tribunals—acting pursuant to such international authority—that they are security internees who should be detained for imperative security reasons. 07-394 Pet. App. 103a; J.A. 44, 48. That determination is a sufficient basis for their detention, and any challenge to that determination or their detention pursuant to international

authority comes within the rule of *Hirota*.[5] In that respect, they are like thousands of other security internees held by the MNF-I. In addition, Munaf is also being held pursuant to his criminal conviction by an Iraqi court. See J.A. 44, 48, 61. Thus, like the habeas petitioners in *Hirota*, Omar and Munaf are being held by a multinational force abroad pursuant to international authority. See J.A. 43; 07-394 Pet. App. 101a.

While the United States is, to say the least, a vital component of the MNF-I, that was no less true of the United States forces operating as part of the Allied Powers in Japan. See *Hirota*, 338 U.S. at 207 (Douglas, J., concurring) ("[T]hough the tribunal is dominated by American influence, it is nonetheless international in character."). Here, the U.N., the United States, and the 26 other nations participating in the MNF-I all view the multinational force as having a distinct identity from the forces of any particular nation. The courts below did not identify any basis to countermand that quintessential foreign affairs judgment and disregard the MNF-I's international origin and authority.

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[5] The three-member MNF-I tribunal determined that Omar was not only a security internee but also an enemy combatant. See p. 5, *supra*. Omar's detention by the MNF-I, however, is justified by international authority, and does not depend solely on United States authority, and the MNF-I has, pursuant to international authority, sought to refer Omar's case to Iraqi authorities. In this habeas action Omar has challenged his detention by the MNF-I *vel non* (and therefore his detention pursuant to international authority) and sought to enjoin his transfer to Iraqi criminal authorities. Should the United States choose to detain Omar as an enemy combatant after the international authority for his detention as a security internee were to expire (for example, through the expiration of the U.N. declarations authorizing the MNF-I), a different jurisdictional question would arise.

In addition, while the multinational force—pursuant to its U.N. mandate—operates subject to a unified American command, and while the U.S. chain of command ultimately runs to the President of the United States, that was no less true in *Hirota*. As discussed, the multinational force in *Hirota* operated under the "[s]upreme" command of General MacArthur, and the tribunal pursuant to whose judgment the habeas petitioners were being held had been "set up by General MacArthur." 338 U.S. at 198. Here, as in *Hirota*, however, the key is that the American forces that command and in part comprise the MNF-I are not operating solely under United States authority, but rather "as the agent of" a multinational force that was established by and operates pursuant to international authority. *Ibid.*[6]

B. The Jurisdictional Limitation Recognized In *Hirota* Is Supported By Core Separation-Of-Powers Principles

The restraint called for by *Hirota* is supported by fundamental separation-of-powers principles. As Justice Jackson observed as to *Hirota*, "the issues here * * * involve decision of war crimes issues secondarily, for primarily the decision will establish or deny that this Court has the power to review exercise of military power

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[6] In *Omar*, the court of appeals stated that "the government concedes * * * that [U.S.] forces operate 'subject to' no independent MNF-I authority." 07-394 Pet. App. 15a. It is not clear what the court intended by that statement. As the government made clear, the MNF-I is an international entity distinct from the United States and, while the MNF-I is under unified American command, the same was true of the multinational force in *Hirota*. See, *e.g.*, *Omar* Gov't C.A. Br. 5-6, 30; *Omar* C.A. Reply Br. 5-6; 9/11/2006 *Omar* Tr. 10-11. Indeed, the government specifically explained that it would "mischaracteriz[e]" the government's arguments to say that U.S. forces do not operate "subject to * * * multi-national authority." *Id.* at 20-21.

abroad and the President's conduct of external affairs of our Government." *Hirota* v. *MacArthur*, 335 U.S. 876, 879-880 (1948) (statement regarding setting motions for oral argument). Here as in *Hirota*, the challenged actions are not of the Executive acting alone, but those of the United States acting as part of a multinational force under international authority, and in partnership with a local foreign sovereign that unquestionably has jurisdiction to detain persons within its own borders pursuant to its own laws to enhance national security.

1. The Constitution grants the President authority to enter into executive agreements with allied foreign nations regarding the conduct of war. See, *e.g.*, *American Ins. Ass'n* v. *Garamendi*, 539 U.S. 396, 415 (2004). Pursuant to that authority—and consistent with a statutory framework establishing the parameters for the United States' participation in the U.N., see 22 U.S.C. 287 *et seq.*—the Executive agreed to participate in the MNF-I, and also agreed, in conjunction with U.N. Resolution 1546, that the MNF-I would undertake "internment where this is necessary for imperative reasons of security." 07-394 Pet. App. 86a. The MNF-I, including the United States, then entered into a further agreement with Iraq to hold the detainees that were referred for investigation and prosecution before the Iraqi courts during the Iraqi judicial proceedings. J.A. 48.

The habeas petitions in this case ask the United States courts to review determinations made by the multinational force that was authorized by the U.N. to carry out those international commitments in an active combat zone. "Without doubt, our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them." *Hamdi* v. *Rumsfeld*, 542

U.S. 507, 531 (2004) (plurality opinion); see *Fleming* v. *Page*, 50 U.S. (9 How.) 603, 615 (1850). Moreover, Congress authorized the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * enforce all relevant United Nations Security Council resolutions regarding Iraq." Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § (3)(a), 116 Stat. 1501. Thus, the President's constitutional authority to enter into the relevant agreements "is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

The exercise of habeas jurisdiction in these cases would interfere with the Executive Branch's international commitments, as well as its ability to carry out its military and foreign policy objectives. As Justice Jackson observed in *Hirota*, "[f]or this Court now to call up these cases for judicial review under exclusively American law can only be regarded as a warning to our associates in the trials that no commitment of the President or of the military authorities, even in matters such as these, has finality or validity under our form of government until it has the approval of this Court." 335 U.S. at 878 (statement respecting oral argument). "And since the Court's approval or disapproval cannot be known until after the event—usually long after—it would substantially handicap our country in asking other nations to rely upon the word or act of the President in affairs which only he is competent to conduct." *Ibid.*; see Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 Stan. L. Rev. 587, 644 (1949) (It will not promote the efforts "to work together [with

allied nations] for joint defense * * * to foster the idea that an American commander, even when exercising an Allied trust, works under some vague supervision by the United States Supreme Court.").

Other nations may inevitably take offense if American courts were to assume the authority to review the determinations of international bodies in which United States forces or personnel participate abroad. And if the United States courts were to assume this authority, there is no reason why the courts of other nations could not do so, potentially subjecting decisions of multinational bodies like the MNF-I, in which some 27 nations participate, to review and inconsistent judgments in multiple fora worldwide. As the government observed nearly 60 years ago in *Hirota*, when such joint international endeavors were far less common, "[t]he full reach of any assumption by this Court of competence in these matters cannot now be foreseen, but we emphasize the government's deep concern lest irreparable damage be done, and its hope for a complete and prompt termination of these efforts by petitioners to hamper and defeat vital international engagements." Br. in Opp. to Mots. at 74, *Hirota*, *supra* (No. 239, Misc.).

As the district court in *Munaf* observed, "no court in our country's history, other than [in *Omar*], has ever found habeas corpus jurisdiction over a multinational force comprised of the United States acting jointly with its allies overseas." 06-1666 Pet. App. 37. Given the potentially grave separation-of-powers and international repercussions of exercising such jurisdiction, this Court should insist on a clear showing of jurisdiction to justify such an unprecedented and far-reaching exercise of American judicial authority. The habeas petitioners in these cases have failed to make such a showing.

2. These concerns are magnified by the fact that the habeas petitioners in these cases ask the United States courts to review decisions made, not unilaterally by the United States, but by the MNF-I or the Iraqi government. MNF-I panels determined that Omar and Munaf present grave risks to the security of Iraq and should be referred for investigation and prosecution by the Iraqi courts. Moreover, the Iraqi courts found Munaf guilty of serious criminal conduct in Iraq. Even if any habeas relief awarded by the courts in these cases technically were styled to run solely against the United States, the actions of the MNF-I and the Government of Iraq would be impugned, and their authority infringed, by such relief. See *Sea Containers Ltd.* v. *Stena AB*, 890 F.2d 1205, 1213 (D.C. Cir. 1989).

Moreover, Omar and Munaf have made clear that they do not seek relief solely vis-a-vis the United States. In *Omar*, the court of appeals affirmed an injunction against the United States and all those acting in concert with it, including the MNF-I. 07-394 Pet. App. 27a, 59a. That injunction reflects the reality that the United States is not operating unilaterally here. But that reality should have led to the recognition that *Hirota* was applicable, not to a broader, more problematic injunction. Moreover, both Omar and Munaf have sought an injunction requiring their safe passage *out of* Iraq and return to the United States. J.A. 40, 123. Thus, they have made clear that mere release from their custody by United States forces acting as part of the MNF-I would not redress their claims; instead, they seek broader protection from the MNF-I and the Iraqi government. Review of these habeas petitions would therefore directly infringe the interests of other sovereigns, *viz.*, the Gov-

ernment of Iraq and the 26 other nations participating in the MNF-I.

3. Nor is it clear what standards would apply to the determinations that Omar and Munaf seek. Under the U.N. resolutions, the MNF-I has authority to detain individuals where "necessary for imperative reasons of security." 07-394 Pet. App. 86a. That is not a standard the United States courts are accustomed to considering, and it turns on precisely the type of security judgments that are constitutionally committed to the Commander in Chief. See, *e.g.*, *Department of the Navy* v. *Egan*, 484 U.S. 518, 528-530 (1988). Any effort to replace that U.N.-adopted standard with a new United States standard would raise its own host of issues, especially considering the novelty of the habeas claims at issue here.

C. Jurisdiction Does Not Turn On Whether A Habeas Petitioner Has Been Convicted By A Foreign Tribunal

The court of appeals erred in determining that *Hirota*'s jurisdictional holding is limited to individuals who have been convicted of criminal offenses by a foreign or international tribunal. See 06-1666 Pet. App. 4; 07-394 Pet. App. 12a. The court of appeals recognized that both Omar and Munaf are being held abroad by an international force pursuant to international authority. 06-1666 Pet. App. 4; 07-394 Pet. App. 11a. But the court held that the district court could properly exercise jurisdiction over Omar's petition because, unlike Munaf, he has not been convicted by an Iraqi criminal court. 06-1666 Pet. App. 3-4; 07-394 Pet. App. 12a. To "preserv[e]" that purported jurisdiction in *Omar*, the court of appeals then upheld an injunction that prevents the Iraqi courts from trying Omar. *Id.* at 26a, 27a. In other words, the court of appeals viewed *Hirota* as establishing a rule

that bars review of detention by a multinational force once related foreign or international criminal proceedings reach judgment, but not before then.

1. As Munaf has argued (06-1666 Pet. 19), *Hirota* does not, and could not plausibly, rest on such a distinction. Instead, as discussed above, *Hirota* relied on the source of authority under which the petitioners were held, not on the existence of criminal convictions. See pp. 18-21, *supra*. While a foreign criminal conviction provides an international source of authority for custody, nothing in *Hirota* suggests that convictions are the *only* possible source of such authority. Individual who are held under international authority are fully subject to the *Hirota* rule (regardless of whether they are referred for criminal proceedings for their actions). And that is particularly true where, as here, the individuals are being held pursuant to a determination by a tribunal convened by the multinational force—acting under international authority—that they present security concerns and that they should be held pending further criminal proceedings by a foreign sovereign.

2. The court of appeals' re-conceptualization of *Hirota* is difficult to square with "the longstanding principle that 'the jurisdiction of the Court depends upon the state of things at the time of the action brought.'" *Keene Corp.* v. *United States*, 508 U.S. 200, 207 (1993) (quoting *Mollan* v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824)); accord, *e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003). Under the court of appeals' approach, the district court had jurisdiction when Munaf

filed his habeas petition, but was divested of that jurisdiction when the CCCI convicted him.[7]

What is more, under the *Omar* court's view, if jurisdiction is present when a petition is filed because collateral foreign criminal proceedings have not yet been initiated or resulted in a conviction, then a district court may enter an injunction to *prevent* those proceedings from going forward. The *Omar* rule thus provides district courts with a perverse incentive to intervene precipitously and "preserve" their asserted jurisdiction by entering injunctions that interfere with the ability of foreign courts to exercise their undoubted jurisdiction over persons within their borders, as the district court did in *Omar*. As discussed below, the district court had no authority to enter such an injunction. See pp. 36-51, *infra*. But the very prospect of such injunctions underscores the problems with a rule that makes the existence of jurisdiction in this context turn on whether the habeas petition is filed before or after the conclusion of foreign criminal proceedings.

3. The court of appeals asserted in *Omar* that the fact of a conviction is dispositive because it means that "some form of judicial process has occurred." 07-394 Pet. App. 14a. But *Hirota* in no way turns on the fact or adequacy of some alternative process. *Hirota* is silent as to what process the petitioners received. 338 U.S. at 198. But even more fundamentally, *Hirota* addresses circumstances where the basic complaint is that the multinational or foreign tribunal—whether completed or not—is an inadequate substitute for the due process

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[7] One court's entry of judgment can have preclusive consequences on other pending litigation. See, *e.g.*, *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 544 U.S. 280, 293 (2005). But "[p]reclusion, of course, is not a jurisdictional matter"; it is a defense on the merits. *Ibid.*

provided by United States courts. And, of course, the whole thrust of *Hirota* is that United States courts are not well-positioned to make those pronouncements. See also *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901). Indeed, one of the *Hirota* petitioners' central allegations was that they were denied due process by the international tribunal, but the *Hirota* decision makes no mention of that assertion, and places no reliance on it. See, *e.g.*, Pet. Br. at 16, 20, *Hirota*, *supra* (No. 239, Misc.).

Finally, the degree of process received—whatever its impact on the merits—has nothing to do with the existence of jurisdiction. In contrast, the determination whether a prisoner is in custody under the authority of the United States, or of a multinational entity, goes directly to the question of habeas jurisdiction. See 28 U.S.C. 2241(c)(1). And, of course, a concern with ensuring that judicial process *occurs* provides no basis whatsoever for *enjoining* Omar's presentation to an Iraqi court for that very process.

D. The *Hirota* Rule Operates Independent Of Citizenship

Omar and Munaf argue (06-1666 Pet. 12-16; 07-394 Br. in Opp. 14-18) that United States courts have jurisdiction over their habeas petitions because they are United States citizens. But, as noted, the critical focus in *Hirota* was on the source of detention authority. *Hirota* turned no more on citizenship than on the completion of the foreign or international proceedings. To be sure, because the habeas petitioners in *Hirota* were aliens, the Court's decision does not specifically address whether its jurisdictional rule applies to citizens. But the failure of *Hirota* to focus on the petitioners' status as aliens—and failure to reserve the question of citizen-detainees—only underscores that the fact that mattered

in *Hirota* was not citizenship, but the fact that the petitioners were held under international authority. Citizenship does not change the source of authority under which a person is held. Either the person is held under international authority, or he is not. Thus, while the *Hirota* Court did not address the issue, Justice Douglas recognized in his concurring opinion that the rationale of *Hirota* does not lend itself to a citizenship exception. See 338 U.S. at 202-203, 205. So did the court of appeals here. 06-1666 Pet. App. 4; see 07-394 Pet. App. 12a.

1. Omar and Munaf argue that "citizenship is 'a head of jurisdiction.'" 07-394 Br. in Opp. 22 (quoting *Johnson* v. *Eisentrager*, 339 U.S. 763, 769 (1950)). But citizenship itself does not automatically confer habeas jurisdiction. If it did, the federal courts would be open on habeas to claims of United States citizens being held under the authority of any non-American tribunal. It is well settled, however, that federal courts may not entertain claims by United States citizens incarcerated by foreign nations under foreign law. See, *e.g.*, *United States ex rel. Keefe* v. *Dulles*, 222 F.2d 390, 391-392 (D.C. Cir. 1954), cert. denied, 348 U.S. 952 (1955). Indeed, habeas courts lack authority over cases involving American citizens detained under the authority of foreign convictions even when the petitioners are in the actual custody of the United States because they are serving their sentences here. See, *e.g.*, *Bishop* v. *Reno*, 210 F.3d 1295 (11th Cir.), cert. denied, 531 U.S. 897 (2000).

Neither the habeas statute nor the Constitution confers jurisdiction in the circumstances here. The habeas statute does not provide a separate right to habeas for citizens that would override the result in *Hirota*. And whatever the reach of the Constitution in other circumstances, in *Neely*, this Court held that "the provision[] of

the Federal Constitution relating to the writ of *habeas corpus* * * * ha[s] no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U.S. at 122. *Neely* involved crimes committed by an American citizen in Cuba when the United States was the sole occupying force of that country; its holding applies *a fortiori* to this case, where the crimes were committed against the sovereign government of Iraq and the United States is participating in a multinational force comprised of 27 nations.

2. The cases on which Munaf relies (06-1666 Pet. 13) for the proposition that citizenship is a font of jurisdiction are inapposite because they involve "petitioners * * * in the custody of the United States alone, in its capacity as the United States, and not by any multinational force" acting under international authority. 06-1666 Pet. App. 29. In other words, the cases relied upon by Munaf do not involve the critical factor that makes *Hirota* applicable; unlike the petitioners in *Hirota* and these two cases, the petitioners in the cases cited by Munaf *were* being held "in custody under or by color of the authority of the United States," 28 U.S.C. 2241(c)(1), and not pursuant to international authority.

In *Eisentrager*, for example, the habeas petitioners (who were not United States citizens) were indisputably being held under the exclusive authority of the United States. Indeed, this Court emphasized at the outset of its decision that "[t]he proceeding [pursuant to which the habeas petitioners were detained] was conducted wholly under American auspices." 339 U.S. at 766.[8]

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[8] Were it otherwise, *Eisentrager* could have been decided with a quick citation to *Hirota*. But *Eisentrager* focused on the status of the petitioners, not on the source of detention authority. For similar reasons, this Court's intervening decisions in cases like *Rasul* v. *Bush*, 542

Similarly, in *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), the petitioner was held in West Virginia following her conviction by the United States Courts of the Allied High Commission for Germany. *Id.* at 343-345, 357. The *Madsen* court explained that the United States Courts of the Allied High Commission for Germany were "in the nature of military commissions conforming to the Constitution and laws of the United States" that "derived their authority from the President as occupation courts, or tribunals in the nature of military commissions, in areas still occupied by United States troops." *Id.* at 356, 357 (emphasis omitted); see *id.* at 358 (noting that the judges' authority derived from "the President"); *id.* at 371-372 (Black, J., dissenting). Other cases relied on by Omar and Munaf (*e.g.*, 06-1666 Pet. 13) similarly involve United States court martials undertaken pursuant to United States authority and law. See *McElroy* v. *Guagliardo*, 361 U.S. 281 (1960); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955); *Burns* v. *Wilson*, 346 U.S. 137 (1953) (plurality opinion).

Nor do this Court's recent decisions in *Hamdi* and *Rasul* v. *Bush*, 542 U.S. 466, 481 (2004) provide "grounds for questioning *Hirota*'s continued vitality." 06-1666 Pet. App. 6. Neither *Hamdi* nor *Rasul* addresses the issue decided in *Hirota* or even mentions that opinion. In *Hamdi*, jurisdiction was undisputed

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U.S. 466, 481 (2004), and *Braden* v. *30th Judicial Circuit Ct.*, 410 U.S. 484 (1973), do not undermine the continuing validity of the *Hirota* rule. *Hirota* in no way turned on the territorial reach of the Great Writ. *Hirota* essentially assumed *arguendo* (before *Eisentrager* settled the matter to the contrary) that the writ could have extended to the petitioners if they were held by United States forces under United States law, but held that jurisdiction was absent for the independent reason that the petitioners were held under multinational authority.

because the petitioner challenged his detention by United States forces acting solely under domestic authority at the Naval Brig in South Carolina, and the habeas action was specifically limited to the prisoner's detention in the United States by United States forces alone. See 542 U.S. at 511, 525 (plurality opinion).

Rasul is similarly inapposite. The detainees in *Rasul* were being held by United States forces acting solely under United States authority. Thus, there was no assertion in that case that the United States military officers detaining the petitioners in the U.S. Navy base in Guantanamo Bay, Cuba, were acting under international authority. Indeed, this Court determined that those officers were acting in a territory over which the United States exercises "complete jurisdiction and control." 542 U.S. at 480 (citation omitted); see *id.* at 481-482. The Court also undercut the distinction Omar and Munaf seek to draw here by noting that the habeas statute "draws *no distinction* between Americans and aliens held in federal custody." *Id.* at 481 (emphasis added).

3. While *Hirota*'s source-of-authority rationale does not lend itself to a citizenship exception, the separation-of-powers concerns that support *Hirota* nevertheless would counsel strongly in favor of limiting any overruling of *Hirota* to the context of petitions brought by citizens. As a practical matter, limiting jurisdiction in these circumstances to habeas claims filed on behalf of citizens would limit the scope of disruption to the ongoing activities of the MNF-I and the Government of Iraq because the vast majority of the detainees held by the MNF-I are aliens.[9] Nevertheless, as discussed above, under a

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[9] Several aliens held by the MNF-I have already filed habeas petitions seeking injunctive relief prohibiting the MNF-I from trans-

proper application of *Hirota*, citizenship does not confer jurisdiction over the habeas petitions at issue.

II. UNITED STATES COURTS LACK AUTHORITY TO BLOCK THE MNF-I FROM SURRENDERING CUSTODY OF OMAR AND MUNAF TO IRAQI AUTHORITIES

After finding jurisdiction, the court of appeals in *Omar* upheld an injunction that bars the federal parties, and those acting in concert with them, from "remov[ing] [Omar] from United States or MNF-I custody." 07-394 Pet. App. 55a, 59a. Even if this Court overrules *Hirota* and holds that the court properly exercised jurisdiction, an injunction against Omar's *release* from the very custody that the court of appeals viewed as giving it jurisdiction would be indefensible under longstanding habeas practice because release from custody is the traditional *purpose* of the writ. See *Preiser* v. *Rodriguez*, 411 U.S. 475, 484 (1973) ("It is clear * * * that the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody."). Indeed, Omar sought, *inter alia*, that very re-

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ferring them to Iraqi custody. See, *e.g.*, *Ramadan* v. *Bush*, 127 S. Ct. 1512 (2007) (No. 06A894) (application for injunction pending appeal denied by the Court); *Al-Bandar* v. *Bush*, 127 S. Ct. 854 (2007) (No. 06A644) (same); *In re Hussein*, 468 F. Supp. 2d 126 (D.D.C. 2006) (motion for injunction and habeas petition denied for lack of jurisdiction under *Hirota*). While those petitioners had been convicted by a foreign tribunal before initiating their habeas actions (and therefore would be precluded from filing habeas claims under the court of appeals' "conviction" limitation), it stands to reason that foreign nationals detained by the MNF-I who are detained as a preventive matter or otherwise have not yet been convicted by a foreign tribunal would file habeas actions in the United States courts if this Court were to affirm in *Omar* without regard to citizenship.

lief in this case. J.A. 123. The very prospect of a court effectively enjoining a prisoner's release from custody turns the basic function of the Great Writ on its head.

Although the court of appeals recognized that the district court could not lawfully bar Omar's *release* from custody *vel non*, it re-characterized the injunction against his release as one against (1) transferring Omar to Iraqi custody, (2) sharing with the Iraqi government details concerning any decision to release him, and (3) allowing him to appear before the Iraqi courts to answer for alleged crimes committed in Iraq. See 07-394 Pet. App. 20a, 23a, 25a. Those extraordinary restrictions on the handling of a security internee in a foreign combat zone are even less justifiable than the district court's ban on Omar's outright release. The inability of the traditional habeas remedy to provide meaningful relief—because Iraqi authorities would exercise their sovereignty to take custody over someone who poses a security risk and has violated the domestic criminal laws of Iraq, which is precisely the course Omar seeks to evade—should have cautioned against granting habeas relief. Instead, it impelled the court of appeals to interfere even more deeply in the relationship between the United States military, the MNF-I, and the Iraqi government.

Munaf's request for an analogous injunction is even more inappropriate. Because the Iraqi courts have already convicted Munaf (one of Iraq's own citizens), his request for an injunction against his transfer to Iraqi custody not only raises the same international comity and separation-of-powers concerns as the unprecedented injunction upheld in *Omar*, but amounts to an impermissible collateral attack on his Iraqi conviction. In effect, the habeas petitioners seek an injunction from

the United States courts that would provide them with a right to be a fugitive from Iraqi justice while in Iraq for crimes committed in Iraq. Nothing in this Court's cases, or settled habeas practice, supports that result.

A. The District Court Had No Basis To Frustrate Iraq's Criminal Jurisdiction Over Persons Within Its Borders

1. Nations have criminal jurisdiction over persons within their borders, including United States citizens, unless they have waived that jurisdiction

This Court has long recognized that a "sovereign nation has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Wilson*, 354 U.S. at 529; see *Kinsella* v. *Krueger*, 351 U.S. 470, 479 (1956) (nations have a "sovereign right to try and punish for offenses committed within their borders," generally including offenses committed by "American servicemen and their dependents," unless they "have relinquished [that] jurisdiction"); *Reid* v. *Covert*, 354 U.S. 1, 15 n.29 (1957) (plurality opinion) ("[A] foreign nation has plenary criminal jurisdiction, of course, over all Americans * * * who commit offenses against its laws within its territory."). That principle dates back at least to Chief Justice Marshall's observation in *The Schooner Exchange* v. *McFadden*, 11 U.S. (7 Cranch) 116, 136 (1812), that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."

As Judge Randolph recognized, this Court's decision in *Wilson* invoking that universal principle is "conclusive" (06-1666 Pet. App. 8) here. In *Wilson*, this Court reversed a district court injunction—"very much like the one at issue here," 07-394 Pet. App. 36a n.5 (Brown, J.,

dissenting in part)—barring the United States military from transferring an American soldier (Girard) to Japanese authorities in Japan to face trial for the alleged shooting of a civilian during a training exercise in Japan. 354 U.S. at 525-526. The Court held that Japan "has exclusive jurisdiction to punish offenses against its laws committed within its borders, unless it expressly or impliedly consents to surrender its jurisdiction." *Id.* at 529. Because Japan had not surrendered that jurisdiction, a unanimous Court found "no constitutional or statutory barrier" to the Army's transfer of Girard to Japanese authorities to face trial, and therefore set aside the injunction against Girard's transfer. *Id.* at 530.

No treaty or statute bars the transfer of Munaf or Omar to Iraqi authority. Nor can Omar or Munaf point to any relevant waiver of jurisdiction by Iraq. Accordingly, *Wilson* controls here and requires that the *Omar* injunction be set aside. Indeed, this case presents a more compelling situation than *Wilson* for setting aside the injunction against Omar's transfer to Iraqi authorities. Unlike Girard, who was stationed in Japan when he committed the alleged offense, Omar voluntarily traveled to Iraq and committed alleged criminal offenses there on his own time. Moreover, unlike Girard, Omar was captured in an active combat zone while harboring an Iraqi insurgent and four Jordanian fighters, and while possessing weapons and improvised explosive device- making materials. See 07-394 Pet. App. 103a. In addition, unlike Girard, Munaf has already been convicted by an Iraqi court of criminal conduct in Iraq. 06-1666 Pet. App. 2.[10]

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[10] As was true with respect to the United States Army in *Wilson* (see 354 U.S. at 529-530), the fact that the MNF-I retains discretion under

2. *The Executive does not need any affirmative statutory or treaty authorization to relinquish custody of Omar or Munaf in Iraq*

Omar argues (07-394 Br. in Opp. 33-34) that the United States cannot release him to Iraqi custody without statutory or treaty authorization. Even in peacetime, however, there is no such requirement. As *Wilson* confirms, United States law simply does not obligate the United States (or the MNF-I) to shelter alleged criminals in Iraq from the Iraqi justice system, much less convicted criminals like Munaf. And even if the United States needed express authorization to defer to Iraq's criminal jurisdiction within its own borders, the U.N. resolutions, coupled with Congress's direction to enforce those resolutions, would provide it. Omar's contrary argument—which appears to apply equally to citizens and non-citizens alike—cannot be squared with either Iraq's sovereign prerogatives or the Executive's discretion over such sensitive foreign policy matters, and is tantamount to claiming a right to be a fugitive from Iraqi justice in Iraq for conduct committed there.

a. This Court has held that statutory or treaty authorization is generally required before the United States may *extradite* a person from the United States to a foreign country. See *Valentine* v. *United States ex rel. Neidecker*, 299 U.S. 5, 8-9 (1936); 18 U.S.C. 3184. Thus,

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its U.N. mandate and arrangements with Iraq to determine the circumstances in which it will refer cases to the CCCI or transfer individuals to Iraqi criminal authorities does not alter the analysis. That discretion does not eliminate Iraq's jurisdiction over criminal matters within its own borders or authorize the United States courts to interfere with an MNF-I determination to refer a case to the CCCI or transfer an individual to Iraqi custody.

if Omar and Munaf were in the United States, they presumably could be extradited only pursuant to such authorization. See Extradition Treaty, *done* June 7, 1934, U.S.-Iraq, 49 Stat. 3380.

As Judge Brown explained, however, the transfer of a person *within* a foreign country is not an extradition, and involves different considerations. 07-394 Pet. App. 35a. "Extradition is the process by which persons charged with or convicted of crime against the law of a State *and found in a foreign State* are returned by the latter to the former for trial and punishment." 6 Marjorie M. Whiteman, *Digest of International Law* 727 (1968) (Whiteman) (emphasis added); accord 4 Green Haywood Hackworth, *Digest of International Law* § 304, at 1 (1942). Consistent with that understanding, our extradition treaty with Iraq, like many other extradition treaties, authorizes the surrender of "any person charged or convicted of [certain crimes] committed within the jurisdiction of one of the High Contracting Parties * * * *and who shall be found within the territories of the other High Contracting Party*." Art. I, 49 Stat. 3380 (emphasis added); see 6 Whiteman 727-728; 1 John Bassett Moore, *A Treatise on Extradition and Interstate Rendition* 139-140 (1891). Such treaties are not so limited because the countries perversely wanted to authorize the extradition of fugitives across national borders, but not to permit the surrender of fugitives within a country. Rather, they are so limited because the United States' surrender of a fugitive *within* a foreign country is not an extradition, and does not require any treaty authorization at all.

Thus, the United States statute governing extradition to foreign countries—entitled "Fugitives from foreign country to United States"—applies by its terms

only to persons in the United States. 18 U.S.C. 3184. That statute authorizes a United States court to commence extradition proceedings by issuing a warrant if the person is "found within [the court's] jurisdiction," or "if the whereabouts within the United States of the person charged are not known or, if there is reason to believe that the person will shortly enter the United States." *Ibid.* The court can then consider evidence that could be "received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped." 18 U.S.C. 3190. The reason those extradition statutes do not apply to transfers of custody within a foreign country is that such transfers are not extraditions, and do not require statutory or treaty authorization or judicial approval.

b. Transfer of custody within a country raises fundamentally different issues from extradition. In the extradition context, "the person in question is in the requested state either because he believes refuge can be found there or because of other circumstances." M. Cherif Bassiouni, *International Extradition: United States Law and Practice* 30-31 (4th ed. 2002) (*International Extradition*). Historically, the surrender of such a person to a foreign state "was deemed an exceptional measure running against the traditions of asylum and hospitality." *Id.* at 31. As cases like *Wilson* reflect, however, that historical tradition is reversed when the person is already in the country that wishes to arrest him for conduct there. In that circumstance, the United States may surrender the fugitive unless there is a positive prohibition against doing so. See pp. 38-39, *supra*.

As a practical matter, moreover, Omar has no legal right to block his release from custody, and "[w]here, as here, the prisoner is physically in the territory of the

foreign sovereign that seeks to make the arrest, release is tantamount to transfer." 07-3[illegible] Pet. App. 36a-37a (Brown, J., dissenting in part); see pp. 36-37, *supra*. Indeed, when the United States has custody of a person in a foreign country, it is a misnomer to refer to the United States "transferring" the person to that country's custody. Rather, the foreign country presumptively has a sovereign right to arrest the person within its borders pursuant to its laws, and the United States (including its courts) generally lacks authority to *interfere* with that arrest. See *Republic of the Phillippines* v. *Westinghouse Elec. Corp.*, 43 F.3d 65, 79 (3d Cir. 1994).

c. Settled practice with status-of-forces agreements confirms those points. As noted, each nation generally has criminal jurisdiction over persons, including foreign military personnel, within its borders. *Kinsella*, 351 U.S. at 479. If the United States has military forces stationed in a foreign country, however, it generally enters into a status-of-forces agreement that includes provisions concerning criminal jurisdiction over United States personnel. While the terms of those agreements vary, the foreign country typically permits the United States to exercise primary criminal jurisdiction over alleged offenses committed by its own armed forces in the performance of official duty, but the foreign country typically retains primary criminal jurisdiction over other offenses. *International Extradition* 93. Either state may, however, cede its jurisdiction over a particular matter to the other state, *ibid.*, and if the United States cedes its jurisdiction, it can surrender custody of the individual to the foreign sovereign, see *Wilson*, 354 U.S. at 529-530. The "[s]urrender of American servicemen for foreign trial pursuant to status-of-forces agreements

has received consistent judicial approval." *Holmes* v. *Laird*, 459 F.2d 1121, 1216 n.32 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972); see, *e.g.*, *Wilson*, 354 U.S. at 529-530; *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971); *United States ex rel. Stone* v. *Robinson*, 431 F.2d 548 (3d Cir. 1970); *Cozart* v. *Wilson*, 236 F.2d 732 (D.C. Cir.), vacated as moot, 352 U.S. 884 (1956).

Omar has argued (07-394 Br. in Opp. 33) that the executive agreement in *Wilson* was "signed pursuant to a * * * treaty." The treaty, however, simply authorized the Executive to enter agreements "concerning '[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan.'" *Wilson*, 354 U.S. at 526-527 (quoting the treaty). That general authorization did not specifically permit the surrender of Americans to Japanese custody. No such authorization was needed because, as the District of Columbia Circuit has explained, Japan already had the sovereign right to arrest, prosecute, and punish Americans in its country for violation of its laws. *Cozart*, 236 F.2d at 732, 733. Thus, the status-of-forces agreement "actually is a Japanese *cession* to the United States of criminal jurisdiction" to the extent that it permits the United States to exercise jurisdiction in some cases. *Robinson*, 431 F.2d at 550 n.2.

While the history and effect of status-of-forces agreements supports the conclusion that foreign sovereigns have jurisdiction over individuals who commit criminal offenses within their borders, those agreements are also designed to deal with the situation where foreign nations allow the armed forces of another nation to enter their borders and where the foreign nation seeks to provide protection for its own troops. This case does not involve members of the United States military who

have committed criminal offenses in Iraq, or members of another nation's armed forces who were legitimately stationed in Iraq, but rather individuals who voluntarily traveled to Iraq and committed serious criminal offenses there. As the District of Columbia Circuit has observed, a local foreign sovereign's exercise of criminal jurisdiction over such individuals is "indubitably * * * appropriate." *Holmes*, 459 F.2d at 1216.

d. In any event, even if statutory authorization were required, Congress provided it by authorizing the President "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * enforce all relevant United Nations Security Council resolutions regarding Iraq." Pub. L. No. 107-243, § (3)(a), 116 Stat. 1501. Those resolutions call on the MNF-I to establish a security partnership with the Government of Iraq and to coordinate with it on matters of security. See pp. 2-3, *supra*. As Judge Randolph recognized, that provides any authority needed for United States forces, acting as part of the MNF-I, to transfer individuals determined to be security internees within Iraq to Iraqi custody. 06-1666 Pet. App. 9. The authority of United States forces to operate in Iraq, and to hold security internees on behalf of the MNF-I or the Iraqi government, necessarily include any authority needed to transfer detainees to Iraqi authorities.

3. Iraq has sovereign discretion to establish modes of trial and punishment for offenses within its borders

Omar has argued (*Omar* C.A. Br. 39) that he would be deprived of due process by Iraqi authorities. That contention indicates that he seeks to use the United States courts improperly to collaterally attack foreign proceedings, but it provides no basis for enjoining his

transfer to Iraqi custody. "When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States." *Neely*, 180 U.S. at 123; accord *Holmes*, 459 F.2d at 1219. That rule reflects "international comity [and] respect for the sovereignty of foreign nations on their own territory." *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 408 (1990). "The interests of international comity are ill-served by requiring a foreign nation * * * to satisfy a United States district judge concerning the fairness of its laws and the manner in which they are enforced." *Ahmad* v. *Wigen*, 910 F.2d 1063, 1067 (2d Cir. 1990).

Even in the extradition context, "under what is called the 'rule of non-inquiry' * * * courts in this country refrain from examining the penal systems of requesting nations, leaving to the Secretary of State determinations of whether the defendant is likely to be treated humanely." *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1327 (9th Cir. 1997); see, *e.g.*, *United States* v. *Kin-Hong*, 110 F.3d 103, 110-111 (1st Cir. 1997). Thus, for example, courts will not consider evidence regarding the requesting country's "law enforcement procedures and its treatment of prisoners." *Ahmad*, 910 F.2d at 1067. Rather, "it is the role of the Secretary of State, not the courts, to determine whether extradition should be denied on humanitarian grounds or on account of the treatment that the fugitive is likely to receive upon his return to the requesting state." *Prasoprat* v. *Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005), cert. denied, 546 U.S. 1171 (2006); accord *In re Requested Extradition of Smyth*, 61 F.3d

711, 714 (9th Cir. 1995), amended by 73 F.3d 887 (9th Cir.), cert. denied, 518 U.S. 1022 (1996).

The concerns underlying the rule of non-inquiry are even stronger here than in the extradition context, because Omar is already in Iraq and he therefore has no legal right to evade Iraqi jurisdiction. Moreover, the United States has a unique relationship with the Iraqi justice system, as the United States is working closely with the Government of Iraq to rebuild that country's vital governmental institutions, including its courts. For the courts of the United States to reach out to determine that Iraqi courts are not acceptable fora for the trial of United States citizens would fail to accord Iraq's courts the respect they are due under the principles of international comity on which *Neely* rests.

Omar has asserted (07-394 Br. in Opp. 6-7) that he would be tortured if he were transferred to the Iraqi government. That allegation provides no basis for a United States court to enjoin his transfer, either. The United States would object to the MNF-I's transfer of Omar or Munaf to Iraqi custody if it believed that they would likely be tortured. Even in the extradition context, however, that is fundamentally a foreign affairs determination under the rule of non-inquiry, based in part on the Executive's assessment of the foreign country's legal system and, when the Executive considers it necessary, its ability to obtain foreign assurances it considers reliable—matters the Executive is uniquely well-positioned to consider. See 07-394 Pet App. 38a n.6 (Brown, J., dissenting in part).

B. The Injunction Against Providing Information To Iraq Or Permitting Iraq To Try Omar Is Especially Improper

The other aspects of the district court's unprecedented injunction in *Omar* are even more problematic under the principles discussed above and underscore the extent to which the courts have intruded on core Executive responsibilities and international comity.

1. The court of appeals ruled that, if the MNF-I releases Omar, it may not provide Iraqi authorities with information that would enable them to arrest Omar. 07-394 Pet. App. 22a-23a. As Judge Brown observed, "information sharing among sovereigns regarding the location of persons subject to arrest is a common and desirable practice, particularly in a situation like that in present-day Iraq." *Id.* at 33a. Such information sharing is critical to combating international terrorism and allowing nations to exercise their most basic police powers to maintain security. If the authorities of any nation had information that an individual the United States deemed a dangerous criminal was about to enter the United States, the United States would want that information and would try to reciprocate. Such information sharing is at a particular premium in light of the situation on the ground in Iraq. An order enjoining such coordination and communication is an extraordinary incursion on the Commander in Chief's powers and an extraordinary affront to the sovereign prerogatives of Iraq.

That is all the more so here, where, as Judge Brown observed, the injunction has "the deliberate purpose of foiling the efforts of the foreign sovereign to make an arrest on its own soil, in effect secreting a fugitive to prevent his capture." 07-394 Pet. App. 34a. The MNF-I detained Omar precisely because he is a confirmed security threat who committed hostile and war-like acts in an

active combat zone. Simply releasing him in an area of ongoing combat, without advance notice to the local sovereign, could have grave diplomatic and practical consequences.

The court of appeals rationalized the injunction against communications in a combat zone on the theory that Omar's release would otherwise amount to his transfer to Iraqi authorities. 07-394 Pet. App. 23a. That may be true, but the court of appeals drew the wrong conclusion. The sovereignty of Iraq and the ability of United States forces to coordinate with Iraqi authorities means that the traditional habeas remedy of release would amount to the kind of transfer Omar seeks to enjoin. But that only underscores the continuing correctness of the rule of *Hirota* and the difficulty of employing habeas in this context. That difficulty would not justify attempting to create an effective "release" through the absurd requirement that the MNF-I must, for example, release Omar in the dead of night with an eight-hours' head start before notifying Iraqi authorities that it had released an allegedly dangerous criminal (or, in Munaf's case, a convicted criminal) within its borders.

2. The court of appeals compounded its error by directing that Omar not be brought before the CCCI for trial, even if he remained in MNF-I custody. 07-394 Pet. App. 25a. Even if a United States court could prevent Iraq from assuming custody of Omar, there would be no justification for preventing the Iraqi courts from adjudicating his guilt or innocence while he remained in the MNF-I's custody. The court of appeals' unfounded speculation that Iraq might seize Omar from the MNF-I, *id.* at 25a-26a, is refuted by the government's declaration explaining that he would remain in MNF-I custody during proceedings before the CCCI, *id.* at 106a. Indeed,

the Iraqi courts tried Munaf while he remained in MNF-I custody, without attempting any such seizure.

Moreover, in the status-of-forces context, when a foreign nation exercises criminal jurisdiction over a member of the United States military, the United States commonly retains physical custody of the individual during the judicial proceedings in the foreign nation's courts. See *International Extradition* 95. Although the United States generally has no legal right to insist on retaining custody, foreign nations frequently agree to the accommodation. See *Cozart*, 236 F.2d at 733. Omar has no legal entitlement to greater protection than our soldiers receive by the grace of other nations.

To be sure, if Iraqi courts convicted Omar of criminal offenses, that action would underscore the absence of any basis for the United States courts to enter an injunction against his release to Iraqi custody. At that point, Omar's habeas petition would amount to an impermissible collateral attack on his Iraqi conviction. Indeed, Munaf's habeas petition is now in precisely that untenable posture. As discussed, however, the writ of habeas corpus provides no license for the United States courts to sanction collateral attacks on foreign proceedings. Habeas corpus does not allow direct attacks on foreign judgments, and it does not allow a court to achieve the same result indirectly by enjoining a foreign criminal proceeding from reaching judgment.

In sum, the injunction upheld in *Omar* interferes with the United States' international commitments to the U.N., the other countries comprising the multinational force, and the Government of Iraq; overrides the determinations of a multinational force acting pursuant to authority derived from the U.N. at the request of Iraq; intrudes on Iraq's sovereign interest in prosecut-

ing serious criminal offenses committed within its own territory; and impedes the fundamental mission of the multinational force to help bring security and stability to Iraq. It finds no support in existing precedent and it should be set aside by this Court.

CONCLUSION

The judgment of the court of appeals in No. 06-1666 should be affirmed. The judgment of the court of appeals in No. 07-394 should be reversed.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

GREGORY G. GARRE
Deputy Solicitor General

DARYL JOSEFFER
Assistant to the Solicitor General

DOUGLAS N. LETTER
JONATHAN H. LEVY
LEWIS S. YELIN
Attorneys

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Nos. 07-394 and 06-1666

In the Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR

MOHAMMAD MUNAF, ET AL., PETITIONERS

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

PAUL D. CLEMENT
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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TABLE OF CONTENTS

Page

I. The habeas petitioners fail to account for the international dimensions of these cases 2

II. The United States courts lack jurisdiction over these habeas actions 4

A. The "foreign conviction" rule has no currency 4

B. *Hirota*'s jurisdictional rule governs these cases 5

1. The habeas petitioners' efforts to distinguish and limit *Hirota* are unavailing 5

2. *Hirota* does not lend itself to a citizenship exception 13

III. Even if there is habeas jurisdiction, the *Omar* injunction cannot stand 14

A. As Omar concedes, the *Omar* injunction is overbroad 14

B. The courts lack authority to enjoin a transfer here 15

1. Iraq has criminal jurisdiction over persons, including United States citizens, within its borders 16

2. No affirmative statutory or treaty authorization is required to transfer Omar within Iraq 17

3. Omar's torture argument is unavailing 23

TABLE OF AUTHORITIES

Cases: Page

Ahrens v. *Clark*, 335 U.S. 188 (1948) 11
Behrami v. *France*, No. 71412/01 (Eur. Ct. H.R. May 2, 2007) 9
Belbacha v. *Bush*, No. 07-5258 (Mar. 14, 2007) 24
Braden v. *30th Judicial Cir. Ct. of Ky.*, 410 U.S. 484 (1973) 11
Escobedo v. *United States*, 623 F.2d 1098 (5th Cir. 1980) 24
Flick v. *Johnson*, 174 F.2d 983 (D.C. Cir. 1949), cert. denied, 338 U.S. 879 (1949) 10, 11
Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) 14, 22, 23
Hikmat, In re, No. 19/Pub. Comm'n/2007 (Fed. Cass. Ct. Feb. 19, 2008) (Iraq) 4
Hirota v. *MacArthur*, 338 U.S. 197 (1948) ..... *passim*
Holmes v. *Laird*, 459 F.3d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972) 22
Hoxha v. *Levi*, 465 F.3d 554 (3d Cir. 2006) 24
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 14
Kinsella v. *Krueger*, 351 U.S. 470 (1956) 21
Lopez-Smith v. *Hood*, 121 F.3d 1322 (9th Cir. 1997) 24
Mironescu v. *Costner*, 480 F.3d 664 (4th Cir. 2007), cert. dismissed, 128 S. Ct. 976 (2008) 26
Murray v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804) 23
Neely v. *Henkel*, 180 U.S. 109 (1901) 3, 10, 13

Cases—Continued: Page

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 10
R (on the application of Al-Jedda) v. *Secretary of State for Defense*, [2007] UKHL 58 9
Rasul v. *Bush*, 542 U.S. 466 (2004) 11, 14
Reid v. *Covert*, 354 U.S. 1 (1957) 3
Sale v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155 (1993) 25
Saramati v. *France*, No. 78166/01 (Eur. Ct. H.R. May 2, 2007) 9
Smallwood v. *Clifford*, 286 F. Supp. 97 (D.D.C. 1968) ... 22
The Schooner Exch. v. *McFadden*, 11 U.S. (7 Cranch) 116 (1812) 1, 16, 17, 21
United States ex rel. Stone v. *Robinson*, 431 F.2d 548 (3d Cir. 1970) 22
Valentine v. *United States ex rel. Neidecker*, 229 U.S. 5 (1936) 17, 18, 20
Wilson v. *Girard*, 354 U.S. 524 (1957) 2, 17, 21

Constitution, treaties, statutes and regulation:

U.S. Const. Art. I, § 9, Cl. 2 (Suspension Clause) 10
Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan, Art. II. C (Dec. 27, 1945) 6
Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1498 22
§ 3(a), 116 Stat. 1501 22

Treaties, statutes and regulation—Continued: Page

Charter of the International Military Tribunal for the Far East (Jan. 19, 1946):
Preamble 7
Art. 17 7
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85 24
Extradition Treaty, June 7, 1934, U.S.-Iraq, Art. I, 49 Stat. 3380 ..... 18, 19, 20
Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-761 24
§ 2242(a), 112 Stat. 2681-822 25
§ 2242(b) 112 Stat. 6981-822 25
§ 2242(d) 112 Stat. 6981-822 25
18 U.S.C. 1252 26
18 U.S.C. 3196 20
28 U.S.C. 2241(a) 11
28 U.S.C. 2241(c) 9
28 U.S.C. 2241(c)(1) 11
22 C.F.R. 95.4 26

Miscellaneous:

Bassiouni, *International Extradition: United States Law and Practice* (4th ed. 2002) 18, 20
Coalition Provisional Authority (2004):
Order No. 13 <http://www.cpa-iraq.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf> 12, 13

Miscellaneous—Continued: Page

Order No. 17 <http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition_Rev_with_Annex_A.pdf> 21

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p. 27,584 20

p. 36,192 25

H.R. Rep. No. 1652, 56th Cong., 1st Sess. (1900) 18

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Country Reports on Human Rights Practices—2006 (2007) <http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm> 23

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2 Op. Att'y Gen 559 (1833) 17

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Restatement (Third) of the Foreign Relations Law of the United States (1986) 3, 16

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In the Supreme Court of the United States

No. 07-394

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS

v.

SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR

No. 06-1666

MOHAMMAD MUNAF, ET AL., PETITIONERS

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE FEDERAL PARTIES

It is undisputed that the habeas petitioners (Omar and Munaf) voluntarily traveled to Iraq, allegedly engaged in criminal conduct in Iraq, and remain in Iraq. Under settled international legal principles recognized long ago by Chief Justice Marshall and invoked by this Court on numerous occasions since, the Iraqi authorities have sovereign jurisdiction to try and punish them. *The Schooner Exch.* v. *McFaddon*, 11 U.S. (7 Cranch) 116, 136 (1812). Neither the habeas petitioners nor their amici have provided any basis for this Court to interfere with the exercise of that core component of Iraq's national sovereignty and, in effect, to use the writ of habeas corpus as a means of forcing the Multinational

Force-Iraq (MNF-I) to harbor Omar and Munaf as fugitives from Iraqi justice.

And there is no reason for the Court to take that unprecedented and internationally disruptive step in these cases. As a threshold matter, the United States courts lack habeas jurisdiction because Omar and Munaf are being held by MNF-I under and by color of international authority, and not solely United States authority. That is sufficient to dispose of these cases. See *Hirota* v. *MacArthur*, 338 U.S. 197 (1948) (per curiam). But even if jurisdiction exists to review the habeas petitioners' current detention by *MNF-I*, such jurisdiction cannot be exercised in a manner that would frustrate, much less override, *Iraq's* sovereign right to bring Omar and Munaf to justice for crimes committed in Iraq. At a minimum, therefore, the *Omar* injunction must be vacated.

I. THE HABEAS PETITIONERS FAIL TO ACCOUNT FOR THE INTERNATIONAL DIMENSIONS OF THESE CASES

The habeas petitioners (Br. 17, 34) and their amici attempt to trivialize the international dimensions of these cases by claiming that they seek "routine" habeas review and relief and by repeatedly mischaracterizing MNF-I's uniquely international composition and mission and falsely portraying (Br. 25) MNF-I itself as a "fiction." Whether viewed from the standpoint of the existence of habeas jurisdiction or the authority of the United States courts, the unprecedented result sought by Omar and Munaf would profoundly disrupt international law principles and arrangements.

The background rule against which these cases arise is that foreign countries have sovereign jurisdiction over persons and criminal offenses within their borders. *E.g.*, *Wilson* v. *Girard*, 354 U.S. 524, 529 (1957); see Restate-

ment (Third) of the Foreign Relations Law of the United States §§ 206(a), 421(2)(a) (1986) (Restatement). Thus, this Court long ago held that "citizenship does not give [Americans] an immunity to commit crimes in other countries," nor does it excuse them from having to answer for crimes committed in Iraq according to the "modes of trial and to such punishment as the laws of that country may prescribe for its own people." *Neely* v. *Henkel*, 180 U.S. 109, 123 (1901). The habeas petitioners do not even cite *Neely*, much less attempt to account for it. It is settled law, however, that "a foreign nation has plenary criminal jurisdiction, of course, over all Americans * * * who commit offenses against its laws within its territory." *Reid* v. *Covert*, 354 U.S. 1, 15 n.29 (1957) (plurality opinion).

The habeas petitioners likewise seek to trivialize the international arrangements under which United States forces are present in Iraq. The United States forces are part of a multinational force that is operating in Iraq at the explicit request of the Iraqi government (07-394 Pet. App. 70a, 82a, 91a, 96a) and under U.N. Security Council resolutions authorizing it "to take all necessary measures to contribute to the maintenance of security and stability in Iraq." *Id.* at 74a; see Gov't Br. 2-3. MNF-I itself is not a "fiction" (Br. 25); it is a distinct legal entity with a uniquely international mission. In carrying out its U.N. mandate, MNF-I holds individuals suspected of criminal activity in Iraq pending investigation and prosecution in Iraqi courts under Iraqi law. J.A. 48. Those proceedings enhance both the security and stability of Iraq. And since 2003, MNF-I has transferred some 2000 detainees to the Government of Iraq.

The habeas petitioners are held pursuant to MNF-I's U.N. mandate, and at the request of the Government of

Iraq. MNF-I tribunals have determined that their detentions are necessary in enforcing MNF-I's U.N. mandate to promote security and stability in Iraq. Gov't Br. 5-6 & n.2, 9-10. In addition, Munaf is currently held by order of the Iraqi courts. Although the Iraqi Court of Cassation vacated Munaf's Iraqi conviction last month, it specifically directed that Munaf "remain in custody pending the outcome" of further Iraqi proceedings. *In re Hikmat*, No. 19/Pub. Comm'n/2007, at 4 (Fed. Cass. Ct. Feb. 19, 2008) (Iraq).

Exercising habeas jurisdiction—and certainly granting the requested injunctive relief—not only would directly interfere with Iraq's sovereignty and undermine the U.N.'s efforts to promote the security of Iraq and rebuild its vital governmental institutions, but contravene this Court's precedents, Congress's actions, and the Nation's international commitments.

II. THE UNITED STATES COURTS LACK JURISDICTION OVER THESE HABEAS ACTIONS

As the government has explained, the United States courts lack jurisdiction over these habeas actions under *Hirota*, because Omar and Munaf are being held pursuant to international authority—*viz.*, the terms of U.N. resolutions, the determinations of MNF-I tribunals enforcing those U.N. directives, and the authority of the Government of Iraq. See Gov't Br. 17-28. None of the considerations relied upon by the habeas petitioners warrants any different conclusion.

A. The "Foreign Conviction" Rule Has No Currency

Although the *Omar* court held that *Hirota*'s jurisdictional holding is limited to individuals who have been convicted by a foreign or international tribunal, the habeas petitioners do not defend that illogical holding. See

Gov't Br. 28-31. And recent events underscore the problems with such a rule. Last month, the Iraqi Court of Cassation overturned Munaf's conviction and sentence and remanded his case to the Central Criminal Court of Iraq (CCCI) for another investigative hearing and prosecution. See p. 4, *supra*. Under the decision below, the United States courts had jurisdiction when Munaf filed his habeas petition, lost that jurisdiction when the CCCI entered Munaf's conviction, and regained jurisdiction when the Court of Cassation vacated the conviction (even though that court expressly directed that Munaf remain in custody). Moreover, under the *Omar* decision, with jurisdiction, the United States courts could now issue an injunction effectively precluding the Iraqi courts from going forward with the remand proceedings ordered by the Court of Cassation. Neither party here advocates that untenable result and a correct reading of *Hirota* avoids it.

B. *Hirota*'s Jurisdictional Rule Governs These Cases

While the habeas petitioners say (Br. 16-17) that they fully embrace this Court's decision in *Hirota*—and pointedly do not ask that it be overruled, Br. 16, 35—they advance a series of arguments that simply cannot be squared with *Hirota*. Though that decision is indeed short, there is no word count threshold for a decision of this Court to have stare decisis effect.

1. The habeas petitioners' efforts to distinguish and limit* Hirota *are unavailing

a. The habeas petitioners' principal argument (Br. 15-16, 20, 21, 22-24) is that there must be jurisdiction because they are in the immediate custody of United States soldiers who ultimately answer in the chain of command to the United States Army and its Comman-

der in Chief. That principle would have generated jurisdiction in *Hirota*. Gov't Br. 18-19. The petitioners in *Hirota* were held in the immediate custody of "the United States Eighth Army, who held them pursuant to the orders of [General] MacArthur." *Hirota*, 338 U.S. at 199 (Douglas, J., concurring). Moreover, at all times "the chain of command from the United States to the Supreme Commander [was] unbroken." *Id.* at 207.

The habeas petitioners argue (Br. 25 n.14, 39 n.24) that the United States forces that participated in the multinational force in *Hirota* were ultimately bound by the Far Eastern Commission, which comprised representatives of the Allied Powers. That commission had authority to formulate policy directives, just as the U.N. Security Council formulated the resolutions under which MNF-I operates. See Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan, Art. II.A (Dec. 27, 1945) (Moscow Agreement) (*reprinted in* Gov't Documentary App. 15, *Hirota*, *supra*). But the commission's policy directives were forwarded to General MacArthur only through the United States chain of command. *Id.*, Art. II.C. And, as Justice Douglas explained, "the Commission [was] enjoined to respect 'the chain of command from the United States Government to the Supreme Commander.'" *Hirota*, 338 U.S. at 206 (quoting Moscow Agreement Art. II.C).[1]

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[1] The habeas petitioners (Br. 25 n.14) quote Solicitor General Perlman's response to a hypothetical question concerning whether orders to General MacArthur from the Far Eastern Commission would supersede contrary orders from the United States War Department. See 12/16-17/1948 *Hirota* Tr. 41-42. The Solicitor General also explained, however, that he did not know how that hypothetical circumstance could

It is true that, if the commission had issued a policy directive revoking the Supreme Commander's authority to maintain and oversee the international military tribunal, General MacArthur presumably would have lost that source of international authority for the *Hirota* detentions. But the same is true here. The U.N. resolutions governing MNF-I are scheduled to expire at the end of this year. If they are not re-authorized by the U.N., the international authority pursuant to which the habeas petitioners are held, not to mention MNF-I itself, will lapse. But regardless of the ultimate *duration* of the international authority, it now exists in these cases, just as it existed in 1948 in *Hirota*, and it supplies the authority under which Omar and Munaf are held.

Moreover, as Justice Douglas explained, General MacArthur "was recognized as 'the sole executive authority for the Allied Powers in Japan.'" *Hirota*, 338 U.S. at 206 (citation omitted). General MacArthur both established the international tribunal that sentenced the *Hirota* petitioners and exercised final authority to review its convictions and sentences. See Gov't Br. 18-19; Charter of the International Military Tribunal for the Far East, Preamble & Art. 17 (Jan. 19, 1946) (*reprinted in* Gov't Documentary App. 22, 30-31, *Hirota*, *supra*). Nonetheless, this Court held that the United States courts lacked habeas jurisdiction over the detentions at issue in *Hirota* because the United States military was acting pursuant to international authority—just as the United States forces are doing here.

Relying primarily on non-record materials, the habeas petitioners suggest (Br. 22-24 & nn.10 & 11) that

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arise, because General MacArthur received orders only through his United States chain of command. *Id.* at 41.

MNF-I has no international character. That is incorrect. 06-1666 Pet. App. 32. MNF-I was established by U.N. resolution and will expire with that resolution, Gov't Br. 3 n.1; it comprises representatives from 26 nations (the second-in-command is a British officer and nearly one-third of headquarters General Officer positions are filled by officers from other nations); it has its own command structure and insignia; it operates almost exclusively in Iraq; it works in "close coordination and cooperation" with the Government of Iraq, 07-394 Pet. App. 83a-84a, 86a; and it receives periodic inquiries from the U.N. and must submit quarterly reports to the U.N, which is "to remain actively seized of th[is] matter," *id.* at 80a. See *id.* at 100a-101a.

The habeas petitioners and their amici assert that United States soldiers participating in MNF-I answer to no one but United States officers. That is also incorrect. Because officers of many different ranks and nationalities serve in MNF-I, United States personnel do at times report to, and take orders from, officers from other nations. See Joint Publication 3-0, Joint Operations xiii, II-5 (Feb. 13, 2008) <http://www.dtic.mil/doctrine/jel/new_pubs/jp3_0.pdf> (providing that United States personnel may serve under operational control of foreign commanders). Similarly, *all* MNF-I forces, including forces from the United States and other nations, are subject to MNF-I's unified chain of command. *Nominations: Hearings Before the Senate Comm. on Armed Servs.*, 108th Cong., 2d Sess. 133-134 (2004) (Nomination of Gen. George W. Casey, Jr.).[2]

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[2] Nor is MNF-I Task Force 134—which is responsible for detentions—exclusively American, as amici suggest (NIMJ Amicus Br. 10). Rather, Bulgarian soldiers are serving within that task force.

Accordingly, while the United States unquestionably plays the leading role in MNF-I (just as it did in the international force in *Hirota*), MNF-I is a distinct multinational force operating pursuant to international authority. And, as was true in *Hirota*, the detentions at issue are a direct extension of that authority.[3]

b. Omar and Munaf argue (Br. 21-22) that they are held "under or by color of the authority of the United States," 28 U.S.C. 2241(c), because they are in the immediate custody of United States soldiers and allege violations of United States law. That contention cannot be reconciled with *Hirota*. As the government has explained (Br. 20-21), the *Hirota* petitioners were held in the immediate custody of United States soldiers, made the same basic argument, and even quoted the same

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[3] The habeas petitioners point (Br. 17, 45) to the House of Lords decision in *R (on the application of Al-Jedda)* v. *Secretary of State for Defence*, [2007] UKHL 58, which held in part that the detention of a British citizen by British forces acting as part of MNF-I was not "attributable" to the U.N. That ruling, however, was divided. See *id.* ¶¶ 3, 26 (Lord Bingham's majority opinion); *id.* ¶¶ 88-111 (Lord Rodger's dissenting opinion). Indeed, one Lord thought the "attribution" issue so close that he simply reserved judgment on it. *Id.* ¶ 155 Post Script (Lord Brown). And recent precedent of the European Court of Human Rights involving the U.N.-authorized multinational force in Kosovo reached the opposite conclusion. *Id.* ¶¶ 54-62, 87-91 (Lord Rodger) (discussing *Behrami* v. *France*, *Saramati* v. *France* (Application Nos. 71412/01 and 78166/01 (unreported), 2 May 2007)). Moreover, because the Lords' resolution of this issue was not based on United States concepts of jurisdiction, nothing in *Al Jedda* alters *Hirota*'s jurisdictional rule or calls into question its proper application to these cases. And, in the end, *Al Jedda* is most noteworthy insofar as the Lords unanimously dismissed Al-Jedda's challenge because they concluded that the British forces were not only authorized under the U.N. resolutions at issue here to detain Al-Jedda, but actually *obligated* to do so under MNF-I's U.N. mandate. *E.g.*, *id.* ¶¶ 39, 118, 135.

statutory text in doing so. The habeas statute has not changed in any pertinent respect since *Hirota*, and there is no basis for this Court's interpretation of that statute to change. See, *e.g.*, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (stare decisis applies with greatest force in statutory cases).

The habeas petitioners' Suspension Clause argument is equally unavailing. Here as in *Hirota*, there is no habeas jurisdiction because the habeas petitioners are held under international authority, not under or by color of the authority of the United States. Because habeas jurisdiction does not reach that circumstance (a point settled for at least the last 60 years), it has not been suspended. And even earlier, this Court held that the Suspension Clause (U.S. Const. Art. I, § 9, Cl. 2) does not protect Americans in these circumstances because that Clause has "no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." *Neely*, 180 U.S. at 122.

c. The habeas petitioners (Br. 35-37) attempt to recast *Hirota* as standing only for the proposition that this Court lacked original jurisdiction over the habeas petitions in that case. But the *Hirota* Court did not say a word about this Court's original jurisdiction. Quite to the contrary, *Hirota* framed its holding in terms of the power of "the courts of the United States." 338 U.S. at 198. Thus, no court has ever read *Hirota* as limited to this Court's original jurisdiction. And the District of Columbia Circuit has consistently recognized, from the year after *Hirota* was decided and ever since without exception, that "no court" has jurisdiction to review a habeas petition falling within *Hirota*'s ambit. *Flick* v.

Johnson, 174 F.2d 983, 984, cert. denied, 338 U.S. 879 (1949); see 06-1666 Pet. App. 3.[4]

d. The habeas petitioners argue (Br. 37) that *Hirota* is different because the *Hirota* petitioners "challenged the creation, composition, and workings of the" international military tribunal. But the *Hirota* petitioners advanced the same basic argument that Omar and Munaf are making here. They claimed that they were "not asking this court to review the decision of an international court," but instead were challenging only "official actions taken by General MacArthur as [a] citizen and army officer of the United States." Br. for Koki Hirota at 14, *Hirota*, *supra*; accord *Hirota* 12/16/1948 Tr. 1. In remarkably similar terms, Omar and Munaf argue (Br. 39, 40) that they "make no challenge to any Iraqi or foreign tribunal," but "challenge the lawfulness of their own government's decisions." As a jurisdictional matter, that contention works no better now than then, because it does not affect the source of authority under which the habeas petitioners are held, which was the gravamen of *Hirota*'s holding.

Moreover, the habeas petitioners' contention (Br. 4) that they "have never sought * * * to interfere with any Iraqi proceeding" is inexplicable. Omar sought and

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[4] Nor does the history of *Ahrens* v. *Clark*, 335 U.S. 188 (1948), call into question the continuing validity of *Hirota*. *Ahrens* construed the habeas statute's reference to persons "within their [the courts'] respective jurisdictions," 28 U.S.C. 2241(a), as requiring that a habeas petitioner be physically present within the district court's territorial jurisdiction. *Ahrens*, 335 U.S. at 190. This Court's subsequent retreat from that position in *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 494 (1973), see *Rasul* v. *Bush*, 542 U.S. 466, 478-479 (2004), in no way undermines the separate statutory requirement that a habeas petitioner be "in custody under or by color of the authority of the United States." 28 U.S.C. 2241(c)(1).

obtained an injunction against his presentation to the CCCI for investigation and trial. 07-394 Pet. App. 56a; see *id.* at 59a-60a. Munaf likewise sought an injunction against his transfer to Iraqi custody on the ground that he would not receive "a fair trial." 06-1455 Docket entry No. 6, at 14 (D.D.C. Sept. 8, 2006). After he was convicted by the CCCI, Munaf continued to seek an injunction on the theory that the "Iraqi court operat[ed] under glaring procedural deficiencies." *Id.* No. 12, at 1 (Oct. 13, 2006); see *id.* at 3. And in this Court, Munaf (Br. 40 n.25) again challenges the validity of the Iraqi proceedings. While the Iraqi Court of Cassation has vacated Munaf's Iraqi conviction and remanded for further proceedings, see p. 4, *supra*, that only underscores that Munaf's arguments are appropriately directed to Iraqi, not United States, courts.

The habeas' petitioners' challenge to the legality of their detention by MNF-I is also a direct assault on the determinations of the MNF-I panel that classified Munaf as a security internee and the multiple MNF-I panels and the Combined Review and Release Board (CRRB) that made similar determinations about Omar.[5]

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[5] While the habeas petitioners claim (Br. 22; see *id.* at 2, 3, 10-11) that they have done "no wrong," Munaf initially confessed to his involvement in kidnapping and appeared as a witness against his accomplices. J.A. 46-48. Likewise, MNF-I tribunals determined that both Munaf and Omar pose a security threat. J.A. 44; Gov't Br. 5-6 & n.2. Omar was captured harboring an Iraqi insurgent and four Jordanian jihadists and possessing several weapons and improvised explosive device-making materials. 07-394 Pet. App. 102a-103a. Omar has also received a hearing before the CRRB—a nine-member board composed of six representatives of the Iraqi government and three MNF-I officers—which also affirmed that he poses a security threat. In any event, Omar and Munaf will have an opportunity to argue their cases to the Iraqi courts under "fundamental standards of due process." Coalition

The government's reliance on those international proceedings is not an "eleventh-hour attempt" (Resp. Br. 40) to liken these cases to *Hirota*. To the contrary, the government has always relied on those determinations for this purpose. *E.g.*, Omar Gov't C.A. Br. 26-27; Munaf Gov't C.A. Br. 21, 28. The fact that the habeas petitioners are challenging detentions authorized by MNF-I panels acting under international authority itself brings this case comfortably within the ambit of *Hirota*. Ultimately, our courts could not grant Omar and Munaf habeas relief without countermanding the validity or exercise of that international authority.

2. ***Hirota does not lend itself to a citizenship exception***

Only as a final attempt to distinguish *Hirota* do the habeas petitioners point (Br. 30-34, 41-44) to their citizenship. That indeed is a factual distinction between this case and *Hirota*. But as Justice Douglas himself recognized in *Hirota*, 338 U.S. at 201-202, and as the court of appeals below concluded, *Hirota* "did not suggest any distinction between citizens and noncitizens." 06-1666 Pet. App. 4. Either a habeas petitioner is held under international authority, or he is not. Citizenship has no bearing on that determination. And neither the text of the habeas statute nor the Constitution compels a different result from *Hirota* where, as here, a citizen is being held under or by color of international authority. See Gov't Br. 31-33; *Neely*, 180 U.S. at 122.

The habeas petitioners (Br. 30-34) cite various cases in which this Court exercised jurisdiction over habeas petitions filed on behalf of United States citizens. But as the government has explained (Br. 33-35), none of those

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Provisional Authority (CPA) Order No. 13, at 1 (2004) <http://www.cpa-iraq.org/regulations/20040422_CPAORD_13_Revised_Amended.pdf.

cases involved the detention of citizens pursuant to international authority. That includes *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). See Gov't Br. 34-35.

In *Johnson* v. *Eisentrager*, 339 U.S. 763, 769 (1950), this Court observed that citizenship itself may be a "head of jurisdiction." This Court has never, however, held that citizenship is *always* sufficient to establish habeas jurisdiction, much less held that it confers jurisdiction where the citizen is held abroad in an active combat zone under international authority. Cf. *Hamdi*, 542 U.S. at 577 (Scalia, J., joined by Stevens, J., dissenting) ("Where the citizen is captured outside and held outside the United States, the constitutional requirements may be different."). And it is settled that citizenship does not confer jurisdiction to challenge foreign convictions or sentences vel non. Gov't Br. 32.[6]

III. EVEN IF THERE IS HABEAS JURISDICTION, THE *OMAR* INJUNCTION CANNOT STAND

If this Court finds jurisdiction, it should nevertheless vacate the unprecedented injunction in *Omar* and hold that the United States courts lack authority either to bar Omar's release to Iraqi authorities or otherwise to interfere with Iraqi criminal proceedings against him.

A. As Omar Concedes, The *Omar* Injunction Is Overbroad

The court of appeals explicitly upheld the district court's injunction insofar as it bars the United States

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[6] In any event, if the Court believes there is jurisdiction in these cases, it should rest it on grounds strictly limited to citizens. See *Rasul*, 542 U.S. at 501 (Scalia, J., dissenting) (suggesting that "constitutional doubt" may inform construction of habeas statute as to citizens). That limitation could have vitally important operational consequences, because MNF-I is currently holding approximately 24,000 detainees in Iraq, virtually all of whom are aliens.

and MNF-I from (1) transferring Omar to Iraqi custody, see 07-394 Pet. App. 20a; (2) sharing with the Iraqi government details concerning any decision to release him, *id.* at 23a; and (3) presenting him to the Iraqi courts to answer for alleged crimes committed in Iraq, *id.* at 25a-26a. Omar now concedes (Br. 61) that any injunction "clearly need not include a bar on 'information-sharing.'" And he now suggests (Br. 61) that the Iraqi courts may initiate criminal proceedings against him, though he continues to object to his *presence* before the CCCI. Omar's failure to defend those aspects of the injunction means that it must be vacated at least in part.

Omar argues (Br. 61) that this Court should nonetheless permit the entire preliminary injunction to stand, on the theory that the government's arguments are relevant only to any final injunction the courts might issue at the completion of this litigation. As Omar has previously conceded (07-394 Br. in Opp. 32), however, the availability of preliminary injunctive relief turns in part on the plaintiff's "*likelihood* of success on the merits." See 07-394 Pet. App. 20a. Because Omar would not be entitled to the relevant relief at the conclusion of the litigation, the district court erred by awarding that relief preliminarily. *Id.* at 35a (Brown, J., dissenting in part). And because the preliminary injunction is preventing the CCCI from investigating and trying Omar *now*, it is critical that the injunction be vacated now.

B. The Courts Lack Authority To Enjoin A Transfer Here

Omar defends (Br. 46-47) the injunction against his transfer to Iraqi custody as appropriately "preserv[ing]" the district court's jurisdiction to consider his challenges to (i) his custody by MNF-I and (ii) his potential transfer to Iraqi custody. As the court of appeals recognized,

the first of those challenges provides no basis for an injunction *against* a transfer or other release from MNF-I custody; instead the termination of Omar's MNF-I custody would give him the principal relief to which he could be entitled in habeas. 07-394 Pet. App. 20a; Gov't Br. 36-37. As to the second challenge, the injunction may be sustained only if Omar has a legally enforceable right not to be transferred—within Iraq—to Iraqi authorities for criminal proceedings under Iraqi law for offenses committed in Iraq. He does not.

1. Iraq has criminal jurisdiction over persons, including United States citizens, within its borders

For two centuries, this Court has recognized that a sovereign nation has jurisdiction to punish offenses committed within its borders, unless it has waived that jurisdiction. *The Schooner Exch.*, 11 U.S. (7 Cranch) at 136. As a result, individuals "fall at once under the territorial authority of a state when they cross its frontier." 1 *Oppenheim's International Law* 384 (9th ed. 1992); see Restatement §§ 206(a), 421(2)(a). Indeed, both Omar and Munaf have conceded that, if they were not in MNF-I custody, Iraq would be free to arrest and prosecute them under Iraqi law. See Omar 9/11/2006 Tr. 48-49, 59; Munaf 10/10/2006 Tr. 15-16.

Even if the fact that Omar is held by MNF-I forces, instead of by Iraqi authorities, is sufficient to confer habeas jurisdiction for Omar to challenge his current detention by *MNF-I*, it does not entitle him to shelter from *Iraq's* justice system for criminal acts in Iraq. As this Court recognized in *Wilson*, a sovereign nation is entitled to arrest and prosecute persons within its borders, including foreigners, free from interference by other nations unless it has waived that right or the right

has otherwise been abrogated. 354 U.S. at 525-526. The Court thus reversed an injunction barring United States forces from transferring an American soldier to Japanese authorities to answer for conduct in Japan. *Id.* at 525-526. The same conclusion follows here. Indeed, because Omar traveled voluntarily to Iraq, that result follows a fortiori from *Wilson*. Gov't Br. 38-39, 42-43.

2. No affirmative statutory or treaty authorization is required to transfer Omar within Iraq

Omar principally argues (Br. 48) that the government needs statutory or treaty authorization to transfer him to Iraqi custody. That contention is wrong.

a. Omar and his amici base their argument on the rule that statutory or treaty authorization is generally needed to *extradite* a person from the United States to a foreign country. But the transfer of a person *within* a foreign country is not an extradition and it presents a situation fundamentally different from extradition. Gov't Br. 42-43; 07-394 Pet. App. 36a. In the extradition context, the United States agrees to relinquish its own jurisdiction and, by doing so, to confer personal jurisdiction on a foreign nation that the foreign sovereign would not otherwise have. In contrast, when the person is already in the foreign nation, that nation has sovereign jurisdiction over the person, *The Schooner Exch.*, 11 U.S. (7 Cranch) at 136, and the United States generally lacks authority to *interfere* with that jurisdiction.

Neither Omar nor his amici have identified any contrary authority. The cases and Attorney General opinions on which they rely *all* involve extraditions of persons "found in the United States," not, as here, the surrender of a person within a foreign country. 2 Op. Att'y Gen. 559 (1833); see, *e.g.*, *Valentine* v. *United States ex*

rel. Neidecker, 299 U.S. 5 (1936) (extradition of citizens from New York to France). And, as the federal extradition statutes reflect, Congress itself has long understood extradition to refer to "the *removal to a foreign jurisdiction* for trial of a person who has committed a crime in a foreign country or territory *and fled from justice therein to the United States*." H.R. Rep. No. 1652, 56th Cong., 1st Sess. 1 (1900) (emphases added). The current extradition statute is fully consistent with that understanding. See Gov't Br. 41-42.[7]

Omar's reliance (Br. 49-50) on the extradition treaty between the United States and Iraq is likewise misplaced. That treaty, like many others, authorizes the surrender of "any person charged or convicted of [certain crimes] committed within the jurisdiction of one of the High Contracting Parties * * * *and who shall be found within the territories of the other High Contracting Party*." Extradition Treaty, June 7, 1934, U.S.-Iraq, Art. I, 49 Stat. 3380 (emphasis added). Thus, the treaty is inapplicable where, as here, the person is found within the territory of the charging party.

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[7] The cited treatises are not to the contrary, either. See Resp. Br. 48, 50 n.35; Bassiouni Amicus Br. 18. To the extent that treatises shed light on the question here, they affirm that "[e]xtradition is the process by which persons charged with or convicted of crime against the law of a State *and found in a foreign State* are returned by the latter to the former for trial and punishment." 6 Whiteman, *Digest of International Law* 727 (1968) (emphasis added); accord 1 *Oppenheim's International Law*, *supra*, 948-949; 4 Hackworth, *Digest of International Law* 1 (1942) (Hackworth). Professor Bassiouni's own treatise explains that extradition "presupposes that the person in question is in the requested state," and *not* "within th[e requesting] state's jurisdiction." Bassiouni, *International Extradition: United States Law and Practice* 30, 313 (4th ed. 2002) (*International Extradition*).

Omar notes (Br. 49) that the treaty provides that its "stipulations * * * shall be applicable to all territory wherever situated, belonging to either of the High Contracting Parties or *in the occupancy and under the control of either of them, during such occupancy or control.*" Extradition Treaty, Art. XI, 49 Stat. 3383 (emphasis added). Iraq, however, is no longer occupied by the United States; instead, pursuant to the U.N. resolutions, MNF-I operates in Iraq at the request of the sovereign Government of Iraq to promote the security and stability of that country. 07-394 Pet. App. 89a-91a. Indeed, the creation of MNF-I was directly tied to the *end* of the occupation or control of Iraq. *Id.* at 68a.

Nor is the facility at which Omar is detained a "territory * * * in the occupancy and under the control" of the United States. Extradition Treaty, Art. XI, 49 Stat. 3383. MNF-I controls Camp Cropper in the same sense that the United States controls its embassies and military bases throughout the world, but that does not make such facilities occupied territories. In extradition law, whether an area is occupied and controlled by the United States has long turned on whether the United States governs the *country*, not its authority over particular *facilities*. See generally 4 Hackworth 19-22. Thus, when Romania sought to extradite Munaf for trial on Romanian anti-terrorism charges stemming from the same kidnappings at issue here, Romania ultimately recognized that any extradition request would have to be made to Iraq, not the United States. Romania Ministry of Justice, Summary 5 (2007) <http://www. brennan-

center.org/dynamic/subpages/download_file_49034.pdf>; see *id.* at 3-4.[8]

Omar's reading of the treaty also would produce untenable consequences. Because Omar's position that this is an extradition does not depend on citizenship, it would evidently require the United States to follow formal extradition procedures before MNF-I transfers *anyone*—within Iraq—to Iraqi custody. MNF-I has transferred some 2000 detainees—the vast majority of whom are Iraqis—to the custody of Iraq in enforcing its U.N. mandate. If adopted, Omar's reading of the treaty would effectively preclude MNF-I from discharging an important component of its international mission.

b. Omar's position is also directly at odds with the settled practice regarding status-of-forces agreements (SOFAs). The Executive has entered into numerous such agreements that, among other things, call for the military to surrender servicemen in foreign countries for criminal prosecution in those countries without following extradition procedures. See Gov't Br. 43-44; *International Extradition* 93. And most SOFAs, unlike extradition agreements, are entered into by Executive agree-

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[8] Nor does the extradition treaty preclude extradition of United States citizens, as Omar claims (Br. 49). The treaty provides that "neither of the High Contracting Parties shall be *bound* to deliver up its citizens." Extradition Treaty, Art. VIII, 49 Stat. 3383 (emphasis added). Although this Court construed similar language in a different treaty to *bar* the extradition of citizens, see *Valentine*, 299 U.S. at 15-16, Congress abrogated that holding by authorizing the extradition of a citizen even "[i]f the applicable treaty or convention does not *obligate* the United States to extradite its citizens to a foreign country." 18 U.S.C. 3196 (emphasis added); see 136 Cong. Rec. 27,584 (1990) (explanation of the House Foreign Affairs Committee that Section 3196 was enacted to abrogate *Valentine* because it was "not feasible" to "renegotiate all the pre-*Valentine* treaties").

ment, not by treaty. Norton, *United States Obligations Under Status of Forces Agreements: A New Method of Extradition?*, 5 Ga. J. Int'l & Comp. L. 1, 20 (1975).[9]

Under Omar's theory, those agreements would be invalid, because service members could be surrendered within a foreign country only through traditional extradition procedures, and therefore only with statutory or treaty authorization. Surrenders of service members pursuant to SOFAs have consistently been upheld, however, because such agreements do not *reduce* protections for service members. Gov't Br. 43-44. As discussed, the foreign sovereign already has jurisdiction over persons within its borders. Thus, such agreements typically *increase* protections for United States service members by, for example, permitting the United States to conduct trials in some circumstances. *Ibid.*[10]

While Omar contends (Br. 57) that "lower courts since *Wilson* have consistently scrutinized the legal ba-

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[9] Omar suggests (Br. 54-55) that the SOFA at issue in *Wilson* was authorized by the Senate. But the relevant treaty simply authorized the Executive to enter into agreements "concerning '[t]he conditions which shall govern the disposition of armed forces of the United States of America in and about Japan.'" *Wilson*, 354 U.S. at 526-527 (quoting the treaty). The SOFA itself was not ratified by the Senate.

[10] Omar relies on the determination in the *Schooner Exchange* that "'public ships of foreign friendly powers' are immune from attachment in federal court within the United States." Br. 55 (quoting *Schooner Exch.*, 11 U.S. (7 Cranch) at 141). This Court has been clear, however, that a foreign country has a "sovereign right to try and punish for offenses committed within [its] borders." *Kinsella* v. *Krueger*, 351 U.S. 470, 479 (1956). Omar and Munaf are persons, not public ships. Iraq has ceded its jurisdiction over MNF-I personnel and some other categories of persons, but has not generally surrendered jurisdiction over persons like Omar and Munaf. See CPA Order No. 17, §§ 2, 4 (2004) <http://www.cpa-iraq.org/regulations/20040627_CPAORD_17_Status_of_Coalition__Rev__with_Annex_A.pdf>.

sis for U.S. citizens' overseas transfer," those cases all involved servicemen subject to SOFAs and *upheld* the transfers at issue. Moreover, the cases cited by Omar uniformly undermine his position by explaining, for example, that SOFAs are a "cession to the United States of criminal jurisdiction" that the foreign nation would otherwise have. *United States ex rel. Stone* v. *Robinson*, 431 F.2d 548, 549 n.2 (3d Cir. 1970); see *Smallwood* v. *Clifford*, 286 F. Supp. 97, 100 (D.D.C. 1968). And whatever is true for American servicemen subject to SOFAs, it is "indubitably" true that Americans who *voluntarily* travel to foreign countries are subject to the criminal jurisdiction of those countries while present in them. *Holmes* v. *Laird*, 459 F.2d 1211, 1216 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972).

c. In any event, if a positive source of authority were required for the transfer at issue, the Authorization for Use of Military Force Against Iraq Resolution of 2002 (AUMF-Iraq), Pub. L. No. 107-243, 116 Stat. 1498, along with the U.N. resolutions, would amply provide it. The AUMF-Iraq authorizes the President, *inter alia*, "to use the Armed Forces of the United States as he determines to be necessary and appropriate in order to * * * enforce all relevant United Nations Security Council resolutions regarding Iraq." § 3(a), 116 Stat. 1501. As explained, the transfer of security internees from the MNF-I to Iraqi authorities for prosecution and punishment for crimes within Iraq falls squarely with the U.N. resolutions regarding Iraq. See Gov't Br. 2-3, 45; 07-394 Pet. App. 74a.

"[I]t is of no moment that the AUMF does not use specific language of [transfer]," because prisoner transfers within an active combat zone are a common and important incident of military operations. *Hamdi*, 542

U.S. at 519 (plurality opinion). Indeed, the AUMF-Iraq is more targeted than the authorization this Court relied on in *Hamdi*, because it specifically refers to enforcing the pertinent U.N. resolutions in Iraq. Cf. *id.* at 518-519. And construing the AUMF-Iraq as not authorizing Omar's transfer would contravene the *Charming Betsy* principle, because it would directly interfere with Iraq's sovereign right to prosecute Omar for offenses committed in Iraq. See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (Marshall, C.J.).

3. Omar's torture argument is unavailing

Omar argues (Br. 51-52) that MNF-I may not transfer him to Iraqi custody because he has alleged that he may be tortured. As the government has explained (Br. 47), the United States would object to MNF-I's transfer of Omar to Iraqi custody if it thought that he would likely be tortured. Reports of torture remain a concern as to some sectors of the Iraqi government, including the military. But the State Department has determined that torture is not a systematic problem in the part of the Iraqi government that would have custody of Omar and Munaf, *i.e.*, "Justice ministry prison and detention facilities," which have "generally met internationally accepted standards for basic prisoner needs." Iraq, *Country Reports on Human Rights Practices—2006* § 1(c) (2007) <http://www.state.gov/g/drl/rls/hrrpt/2006/78853. htm>; see also Iraq, *Country Reports on Human Rights Practices—2007* § 1(c) (2008) <http://www.state.gov/g/drl/rls/hrrpt/ 2007/100596.htm>.[11]

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[11] The reports cited by the amici Non-Governmental Organizations (Br. 6-7) are not to the contrary. Those reports refer to specific detention facilities controlled by Iraq's Interior and Defense Ministries, and do not allege torture by the Justice Ministry.

More to the point, even in the extradition context, courts have typically refused under the rule of non-inquiry to review torture allegations, leaving that inquiry to the Executive. Gov't Br. 45-47; *Hoxha* v. *Levi*, 465 F.3d 554, 564 n.14 (3d Cir. 2006); *Escobedo* v. *United States*, 623 F.2d 1098, 1107 (5th Cir. 1980); see also *Lopez-Smith* v. *Hood*, 121 F.3d 1322, 1325-1326 (9th Cir. 1997). The separation-of-powers concerns underlying the rule of non-inquiry are even stronger here, because Omar is already in Iraq with no legal right to evade Iraqi jurisdiction over crimes committed in Iraq.[12]

Omar argues (Br. 51-52) that the rule of non-inquiry has been overcome by the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85, as implemented by the Foreign Affairs Reform and Restructuring Act of 1998 (FARR Act), Pub. L. No. 105-277, 112 Stat. 2681-761. The CAT, however, provides that "[n]o State Party shall *expel, return ('refouler') or extradite* a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." Art. 3 (emphasis added). That prohibition applies only with respect to persons within the United States, not to persons like

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[12] The District of Columbia Circuit recently concluded that torture allegations might provide a basis for preliminarily enjoining the transfer of a Guantanamo detainee to Algeria. *Belbacha* v. *Bush*, No. 07-5258 (Mar. 14, 2007), slip op. 11. In reaching that result, the court of appeals relied in part on its (erroneous) decision in *Omar*. *Id.* at 4. *Belbacha* did not, however, determine whether (or under what circumstances) torture allegations are justiciable, and did not mention the rule of non-inquiry. In any event, Omar—who voluntarily traveled to Iraq and remains in Iraq—is in a materially different situation than a detainee who challenges his transfer from one country to another.

Omar who are already in a foreign country. See *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 183 (1993) (international convention that barred expelling or returning refugees in certain circumstances could not "reasonably be read to say anything at all about a nation's actions toward aliens outside its territory").

Moreover, the Senate conditioned its "advice and consent" to the CAT on its declaration that the convention is not self-executing, 136 Cong. Rec. 36,192 (1990), and therefore can only be enforced through implementing legislation. Omar (Br. 52) points to the FARR Act's statement of policy "not to *expel, extradite, or otherwise effect the involuntary return* of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." § 2242(a), 112 Stat. 2681-822 (emphasis added). That policy statement, however, only underscores that the CAT is limited to efforts to *return* a person to a different country. Nonetheless, as a matter of policy, the United States would oppose Omar's transfer in the face of a likelihood of torture.

To the extent that the FARR Act goes beyond policy to establish a private right of action, that private right is carefully limited to specific immigration proceedings. The Act specifies that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of [the policy quoted above], *except as part of the review of a final order of removal pursuant to [8 U.S.C. 1252].*" FARR Act § 2242(b) and (d), 112 Stat. 2681-822 (emphasis added). Even Omar does not contend that he is subject to a removal order under the

immigration laws, and those immigration laws plainly do not apply to someone in a foreign land.[13]

In the final analysis, it is the habeas petitioners themselves who are seeking an "extradition"—from Iraq *to* the United States—so that they do not have to answer for alleged criminal acts in Iraq. Omar and Munaf have both requested an order requiring the government to bring them to "a court of competent jurisdiction in the U.S," J.A. 40; see J.A. 123, and the unspoken premise of their insistence that they may not be transferred to Iraqi custody is that, if they can prevail on their habeas challenge to their MNF-I detention, they may use the United States courts to secure safe passage out of Iraq. There is no precedent for the use of habeas corpus in that fashion, particularly when such a court order would directly interfere with Iraq's sovereign right to try and punish Omar and Munaf for any criminal acts they committed in Iraq—where they voluntarily traveled and where they remain today.

* * * * *

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals in No. 06-1666 should be affirmed and the judgment of the court of appeals in No. 07-394 should be reversed.

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[13] Congress recognized that the FARR Act "does not permit for judicial review * * * of most claims under the [CAT]." H.R. Rep. No. 432, 105th Cong., 2d Sess. 150 (1998). And the FARR Act and its implementing regulations make clear that there is no right to judicial review even in the *extradition* context. 22 C.F.R. 95.4; see *Mironescu* v. *Costner*, 480 F.3d 664, 674 (4th Cir. 2007), cert. dismissed, 128 S. Ct. 976 (2008). There is no basis for inferring a right to judicial review in the extraordinary situation here.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2008

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IN THE

Supreme Court of the United States

MOHAMMAD MUNAF, ET AL.

Petitioners,

V.

PETE GEREN, ET AL.,

Respondents.

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Petitioners,

V.

SANDRA K. OMAR, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF HABEAS PETITIONERS

WILLIAM H. NEUKOM
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
CHICAGO, IL 60610
(312) 988-5000

Of Counsel:
DAVID J. CYNAMON
MATTHEW J. MACLEAN
DARON T. CARREIRO

Attorneys for Amicus Curiae American Bar Association

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. MEANINGFUL REVIEW OF DETENTION IS FUNDAMENTAL TO THE RULE OF LAW.. 6

A. Habeas Corpus Is Deeply Rooted in the Common Law and Our Constitutional System. 6

B. Due Process Requires That Every Detainee Be Informed of the Allegations Against Him and Afforded a Meaningful Opportunity to Challenge His Detention. 9

II. THE GOVERNMENT'S POSITION WOULD UNDERMINE THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY.. 11

A. No Citizen Should Be Detained Based Solely upon Untested Allegations. 11

B. Participation in a "Multinational Force" Should Not Defeat Jurisdiction over United States Officers. 12

C. A Subsequent Judgment of an Iraqi Court Should Not Affect the Jurisdiction of a United States Court over a Prior Habeas Petition of a United States Citizen. 13

CONCLUSION 15

TABLE OF AUTHORITIES

FEDERAL CASES

Braden v. 30th Judicial Circuit Court of Ky., 410 U.S. 484 (1973) 12

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 8

Duncan v. Kahanamoku, 327 U.S. 304 (1946) 8

Flick v. Johnson, 174 F.2d 983 (D.C. Cir. 1949) 14

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 5, 10-15

Hirota v. MacArthur, 338 U.S. 197 (1948) 13, 14

INS v. St. Cyr, 533 U.S. 289 (2001) 8

Johnson v. Avery, 393 U.S. 483 (1969) 8

Johnson v. Eisentrager, 339 U.S. 763 (1950) 14

Ex parte Milligan, 71 U.S. 2 (1866) 10

Munaf v. Geren, 482 F.3d 582 (D.C. Cir. 2007) 14

Omar v. Harvey, 479 F.3d 1 (D.C. Cir. 2007) 14

Ex parte Quirin, 317 U.S. 1 (1942) 8, 10

Rasul v. Bush, 542 U.S. 466 (2004) 6, 12

Reid v. Covert, 354 U.S. 1 (1957) 14

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 14

Williams v. Kaiser, 323 U.S. 471 (1945) 6

CONSTITUTIONAL PROVISIONS

U.S. Const., Art. I § 9 8

FOREIGN CASES

King v. Overton, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668) 7

King v. Salmon, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669) 7

FOREIGN STATUTES

Petition of Right, 3 Car. 1 c. 1 7

Habeas Corpus Act of 1679, 31 Car. 2 c. 2 7

MISCELLANEOUS

Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ*: (Thorne Ed.) 6

William Duker, *A Constitutional History of Habeas Corpus* (1980) 7

The Federalist No. 84 (Alexander Hamilton) 6

Sir Matthew Hale, *The History of the Common Law of England* (C. Gray Ed. 1971) 7

Thomas Jefferson, First Inaugural Address (Mar. 4, 1801) 6

Charles Le Quesne, *A Constitutional History of Jersey* (1856) 7

INTEREST OF THE AMICUS CURIAE[1]

Pursuant to Supreme Court Rule 37.3, the American Bar Association ("ABA"), as amicus curiae, respectfully submits that the issues now before the Court must be resolved in a way that fulfills legitimate national security objectives while preserving the rule of law as embodied in the writ of habeas corpus.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of more than 413,000 spans all 50 states and other jurisdictions, and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors, and students.[2]

The ABA's mission "is to be the national representative of the legal profession, serving the public and the profession by promoting justice, professional excellence and respect for the law." Among its goals are "[t]o increase public understanding of and respect for the law, the legal

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission. The parties have filed letters consenting to the filing of this brief with the Clerk of the Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

process, and the role of the legal profession" and "[t]o advance the rule of law in the world."[3]

In pursuing its mission and goals, the ABA has established a long-standing commitment to protecting habeas corpus and due process rights. The ABA recognizes the government's responsibility to protect against terrorist activities, but has long concluded that habeas corpus is necessary to prevent arbitrary or unlawful detentions, and that judicial review of detentions is fundamental to this nation's constitutional system and to the rule of law.[4]

The ABA has developed additional competence in this area through its efforts to promote the rule of law, both in this country and elsewhere, through its Rule of Law Initiative. This work has confirmed that the rule of law has no force against a government that can detain a person without judicial review.

The ABA also created a Task Force on the Treatment of Enemy Combatants in March 2002 to examine the framework surrounding the detention of United States citizens declared to be enemy combatants. The Task Force considered the complex questions of statutory, constitutional, and international law and policy raised by such

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[3] ABA Mission and Association Goals, *available at* http://www.abanet.org/about/goals.html (last visited Feb. 3, 2008).

[4] In its most recent list of prioritized and adopted policy positions, the ABA "urges that individuals detained as 'enemy combatants' be afforded certain procedural rights such as access to counsel and the opportunity for meaningful judicial review of their status, including the right to petition for habeas corpus." ABA Legislative and Governmental Priorities for 2007, *available at* http://www.abanet.org/poladv/priorities (last visited Feb. 3, 2008).

detentions. In its preliminary report, the Task Force concluded:

> United States citizens who are detained by the Government have a right under the Constitution to seek release from their detention through a petition for writ of habeas corpus, a fundamental right which Congress has not suspended. Citizen detainees who have not been charged with violations of United States criminal laws or the law of war should therefore be afforded a prompt opportunity for judicial review of the basis for their continued confinement.[5]

In February 2002, the ABA's House of Delegates adopted a policy urging that proceedings before military tribunals guarantee habeas corpus petition rights, certain due process rights, and the right to independent and impartial judicial review of executive detention, particularly the detention of United States citizens.[6] In February 2003, the ABA's House of Delegates adopted a policy urging that United States citizens detained as "enemy combatants" be afforded the opportunity for meaningful judicial review and access to counsel.[7]

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[5] Preliminary Report of the ABA Task Force on Treatment of Enemy Combatants at 23 (August 8, 2002), *available at* http://www.abanet.org/poladv/priorities/enemy/enemy_combatants.pdf.

[6] Revised Report 8C (February 4, 2002), *available at* http://www.abanet.org/poladv/letters/107th/militarytrib8c.pdf (last visited Feb. 3, 2008).

[7] Revised Report 109 (Feb. 10, 2003), *available at* http://www.abanet.org/leadership/recommendations03/109.pdf (last visited Feb. 3, 2008). The report supporting this policy tracked the legal history of the "enemy combatant" designation, as well as United States and international human rights laws

(footnote cont'd)

The ABA's deep concern for protecting habeas corpus rights and for ensuring meaningful judicial review has also been shown in the ABA's recent submission of amicus curiae briefs in this Court[8] and in the United States Court of Appeals for the Second Circuit.[9]

The ABA does not take the position that a citizen may never be detained as an enemy combatant or transferred to the custody of a foreign government. However, as the ABA has stated, "Every person that is detained by our government should have the opportunity for a fair hearing that examines the basis for his/her detention" and further, that "[t]he writ of habeas corpus entrusts the judiciary to ensure that the detention of an individual has legal and factual support."[10]

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and treaties recognizing a detainee's right to judicial review. The report concluded that detainees have a right to judicial review to determine whether there is a factual and legal basis for their detention. *Id. at* 7.

[8] Brief for the American Bar Association as Amicus Curiae in Support of Petitioners, *Hamdi v. Rumsfeld*, No. 03-6696 (Feb. 23, 2004) (asserting that federal courts must be able to conduct meaningful judicial review when United States citizens are detained as "enemy combatants"); Brief of the American Bar Association as Amicus Curiae in Support of Petitioners, *Boumediene v. Bush*, Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007) (asserting that denial of habeas corpus would conflict with the Constitution and undermine the promotion of the rule of law).

[9] Brief for the American Bar Association as Amicus Curiae in Support of Petitioner-Appellee-Cross Appellant, *Padilla v. Rumsfeld*, 352 F.3d 695 (2nd Cir. 2003), *rev'd*, 542 U.S. 426 (2004) (asserting, *inter alia*, that meaningful judicial review requires petitioner's access to counsel).

[10] Habeas Corpus Rights for Detainees Fact Sheet, *available at* http://www.abanet.org/poladv/priorities/enemy/2007apr_habcorp_factsheet.pdf (last visited Feb. 3, 2008).

SUMMARY OF ARGUMENT

Habeas corpus, the power of the courts to review detention by the Executive, has existed in some form for over seven hundred years, and is no less critical today than it was at the inception of our constitutional system. It remains, in the context of military detentions of this country's citizens, a vital protection of the rule of law. Without habeas corpus, such constitutional protections as due process would be unenforceable and meaningless.

The habeas petitioners here are United States citizens who allege that they have been detained as "enemy combatants" and "security internees" by United States military authorities for over two years without due process. Even though these citizens brought their habeas petitions prior to any action by the Iraqi courts, the government now seeks to turn them both over to Iraqi officials, one to be tried before an Iraqi criminal court, and the other to be executed pursuant to an Iraqi judgment.

Although there may be circumstances in which a citizen may be detained as an enemy combatant or transferred to the custody of a foreign government, due process must be provided to ensure that such detentions and transfers are according to law and not arbitrary. There can be no such inquiry without an opportunity for judicial inquiry into the process actually used.

The government argues that its actions are immune from judicial review because it is operating as part of a "multinational force." The ABA respectfully asserts that this argument is inconsistent with this Court's ruling in *Hamdi v. Rumsfeld* that United States citizens have habeas rights even when they are captured abroad and designated "enemy combatants." *See* 542 U.S. 507, 533 (2004) (plurality opinion). Operation as part of a multinational force should not be permitted to defeat the United States

government's responsibilities to its citizens. Unreviewable military action is not consistent with American legal principles.

ARGUMENT

I. MEANINGFUL REVIEW OF DETENTION IS FUNDAMENTAL TO THE RULE OF LAW.

A. Habeas Corpus Is Deeply Rooted in the Common Law and Our Constitutional System.

Habeas corpus, the principle that one should not be imprisoned by the Executive without fair and impartial judicial review to protect against arbitrary or unlawful government detention, is no less critical today than it was at the inception of our constitutional system. As the Founders recognized, habeas corpus is one of the "essential principles of our Government." Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *reprinted in Inaugural Addresses of the Presidents of the United States*, S. Doc. No. 101-10, at 16 (1989). Alexander Hamilton described habeas corpus as "perhaps [a] greater securit[y] to liberty and republicanism than any [the Constitution] contains." *The Federalist No. 84* (Alexander Hamilton).

The modern understanding of habeas corpus throws its roots "deep into the genius of our common law." *Rasul v. Bush*, 542 U.S. 466, 473 (2004) (quoting *Williams v. Kaiser*, 323 U.S. 471, 484 n. 2 (1945)). The writ predates statute, and has existed in some form for over seven hundred years. *See* Henry de Bracton, *De Legibus Et Consuetudinibus Angliæ*: Vol. 4:367 (Thorne Ed.) (containing a form for a writ of habeas corpus ad respondendum).

The importance of the writ has left its mark on English and American history. The refusal of King Charles I to enforce the privilege of the writ was one of the causes

that eventually led to the English Civil War. *See* Petition of Right, 3 Car. 1 c. 1 at ¶ V. During the Protectorate following the English Civil War, prisoners were moved between jails or overseas to prevent service of habeas corpus petitions. *See* William Duker, *A Constitutional History of Habeas Corpus* 48-53 (1980). In 1667, Parliament impeached Edward Hyde, Earl of Clarendon, for such acts. Duker, at 53 (quoting Proceedings in Parliament against Edward Earl of Clarendon, Lord High Chancellor of England, (1663-1667) 6 St. tr. 291).

After the Restoration, when Charles II authorized transfers of English subjects to military garrisons overseas, Parliament responded with the Habeas Corpus Act of 1679, sometimes referred to as the "second Magna Carta" to prevent transfers of prisoners out of the jurisdiction of the habeas courts. *See* 31 Car. 2 c. 2, §§ x and xii.

Particularly as applied to British subjects, there was no question that the power of the writ of habeas corpus extended overseas. In *King v. Overton*, 1 Sid. 387, 82 Eng. Rep. 1173 (K.B. 1668), and *King v. Salmon*, 2 Keble 450, 84 Eng. Rep. 282 (K.B. 1669), the writ of habeas corpus was held to run to the Island of Jersey, which was not part of the Realm of England, but was historically part of the Duchy of Normandy. Sir Matthew Hale, *The History of the Common Law of England*, 121 (C. Gray Ed. 1971); Charles Le Quesne, *A Constitutional History of Jersey*, 98 (1856). Sir Matthew Hale explained *Overton* and *Salmon* on the basis that "the King may demand, and must have an Account of the Cause of any of his Subjects' Loss of Liberty." Hale, *supra*, at 187.

The founders of the United States were deeply aware of the importance of preserving the power of the judiciary to protect individual liberty. Having borne witness first hand to the abuses that can follow when the judiciary is rendered subordinate to executive power (*see* Declaration

of Independence), they saw fit to guarantee the right to habeas corpus in the Suspension Clause of the Constitution. U.S. Const., Art. I § 9. The constitutional protection of habeas corpus predates even the Due Process Clause of the Fifth Amendment.

"There is no higher duty than to maintain [the writ of habeas corpus] unimpaired." *Johnson v. Avery*, 393 U.S. 483, 485 (1969). As this Court has recognized, "[c]ourts and their procedural safeguards are indispensable to our system of government. They were set up by our founders to protect the liberties they valued." *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (citing *Ex parte Quirin*, 317 U.S. 1, 19 (1942)). Clearly, "the writ of habeas corpus is one of the pillars of our constitutional system."[11]

The importance of judicial review extends, perhaps especially, to detentions by military authorities. It would be "extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 136 (1807). Indeed, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301 (2001). As the ABA's Task Force on Enemy Combatants concluded, "indefinite detention, denial of counsel, and

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[11] Habeas Corpus Rights for Detainees Fact Sheet, *available at* http://www.abanet.org/poladv/priorities/enemy/2007apr_habcorp_factsheet.pdf (last visited Feb. 3, 2008).

overly secret proceedings could tear at the Bill of Rights, the very fabric of our great democracy."[12]

B. Due Process Requires That Every Detainee Be Informed of the Allegations Against Him and Afforded a Meaningful Opportunity to Challenge His Detention.

The United States citizens in this case brought their habeas petitions to challenge their detention by United States military forces operating as part of the Multi-National Force – Iraq. They brought their habeas petitions before the Iraqi courts were involved in any way, and their habeas petitions do not raise any challenges against Iraqi court procedures. Rather, these United States citizens are being held solely as a result of a determination by a panel of three American military officers that they are "enemy combatants" and "security internees."

It is unclear what protections, if any, the prisoners received or what standards the panels applied in approving the prisoners' detentions. But it is undisputed that the habeas petitioners were not represented by counsel. They allege in their habeas petitions that they were not afforded due process, and those allegations have yet to be tested in court.

Due process must be provided to ensure that every "citizen-detainee seeking to challenge his classification as an enemy combatant . . . receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral deci-

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[12] Revised Report 109 (Feb. 10, 2003), *available at* http://www.abanet.org/leadership/recommendations03/109.pdf (last visited Feb. 3, 2008).

sionmaker." *Hamdi*, 542 U.S. at 533. Without judicial review to ensure that such process is actually provided, the vitality of constitutional rights lies entirely within the discretion of a single branch of government. That result is fundamentally contrary to the rule of law.

The ABA does not take the position that a citizen may never be detained as an enemy combatant or transferred to the custody of a foreign government; however, the ABA continues respectfully to assert that due process must be provided to ensure that such detentions and transfers are according to law and not arbitrary. *See* ABA Amicus Brief, *Hamdi v. Rumsfeld*, No. 03-6696 (U.S. Feb. 23, 2004). There can be no such inquiry without an opportunity for judicial inquiry into the process actually used.

To be sure, the Executive is entitled to some deference with respect to actions taken pursuant to its constitutional responsibilities in the conduct of foreign affairs and as commander-in-chief of the Armed Forces. But such deference has never extended so far as to authorize Executive detentions of United States citizens without any judicial review. "While we accord the greatest respect and consideration to the judgments of military authorities in matters relating to the actual prosecution of a war, and recognize that the scope of that discretion necessarily is wide, it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated role of reviewing and resolving claims like those presented here." *Hamdi*, 542 U.S. at 535. The judiciary must be empowered to honor its responsibilities "in time of war, as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." *Quirin*, 317 U.S. at 19. The Constitution is this country's greatest strength, not its weakness. *See Ex parte Milligan*, 71 U.S. 2, 120-21 (1866).

II. THE GOVERNMENT'S POSITION WOULD UNDERMINE THE RULE OF LAW AND THE INDEPENDENCE OF THE JUDICIARY.

A. No Citizen Should Be Detained Based Solely upon Untested Allegations.

At this preliminary stage, the issue before this Court is not whether the habeas petitioners may be turned over to Iraqi authorities. Rather, the issue before this Court is whether the petitioners' habeas claims may be heard, and whether the district court can protect its jurisdiction by enjoining such a transfer while a habeas petition is pending.

Both petitioners raised serious claims in their habeas petitions, each of which was filed before the Iraqi courts had any involvement. Both petitioners claim that they are United States citizens and that they have been seized and detained as alleged "enemy combatants" and "security internees" for more than two years by United States military forces without due process. They claim to be innocent of the underlying allegations of enemy belligerency or criminal activity. One claims that he will face torture if turned over to the Iraqi government. The other was condemned to death after his habeas petition was filed. Neither the habeas petitioners nor the habeas respondents have had the opportunity to test their assertions in court.

The ABA takes no position with respect to the merits of the habeas petitioners' claims, but asserts that no citizen should be detained based solely upon untested allegations. "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Hamdi*, 542 U.S. at 537.

B. Participation in a "Multinational Force" Should Not Defeat Jurisdiction over United States Officers.

The government has taken the position that the federal courts have no jurisdiction to review detentions by United States military officers acting as part of the Multinational Force – Iraq, and that, even if the courts have such jurisdiction, the government can defeat it unilaterally by transferring these detainees to the custody of a foreign government. The consequences of either of the government's positions would eviscerate the rule of law, which requires that judicial review must be available to prevent arbitrary or unlawful detention.

The writ of habeas corpus does not act upon the detainee, but upon the custodian. This court has recognized that a writ of habeas corpus may properly issue if the custodian is within the jurisdiction of the court. *See Rasul v. Bush*, 542 U.S. at 481; *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 495 (1973). United States military members in the multinational force remain under the "unified command" (*see* Brief for the Federal Parties at 2) of United States government officials within the jurisdiction of the district court. If the government's position were adopted, and its participation as a part of a multinational force were deemed to immunize its actions from any judicial review, even when applied to United States citizens, such an argument would apply whether or not the detainee had been criminally charged, and whether or not the detainee had received any meaningful opportunity to challenge his detention. Such a result would directly contravene *Hamdi*, which held that a United States citizen detained by United States military authorities has the right to due process. *See Hamdi*, 542 U.S. at 533.

The "multinational force" argument, further, could arguably apply whenever the United States cooperates with allies which, during the past century, has occurred in

nearly every prolonged military conflict in which it has been involved. But cooperation with allies should not be permitted to defeat the United States government's responsibilities to its citizens. "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi*, 542 U.S. at 536.

In asserting that participation in a multinational force should not impair the jurisdiction of the federal courts over United States officials, the ABA in no way means to disparage the contributions of this country's allies in the United Nations or the efforts of the Iraqi people in restoring security and stability in Iraq. But the ABA knows, and has seen in its work in promoting the rule of law overseas, that a strong and independent court system in the United States with the power to hold even the military accountable to the Constitution can only promote this country's reputation abroad as a defender of liberty and the rule of law. Unreviewable military action is not consistent with American legal principles.

C. A Subsequent Judgment of an Iraqi Court Should Not Affect the Jurisdiction of a United States Court over a Prior Habeas Petition of a United States Citizen.

As noted earlier, the habeas petitions in these cases were filed before, not after, any action by the Iraqi government or its courts. Although jurisdiction was not invoked to review the judgment of the Iraqi courts, the D.C. Circuit panel in *Munaf* held that, in light of this Court's *per curiam* opinion in *Hirota v. MacArthur*, 338 U.S. 197 (1948), there is no jurisdiction because the prisoner was subsequently convicted by an Iraqi court. However, the panel also noted:

> In holding that the district court lacks jurisdiction, we do not mean to suggest that we find the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens. In particular, *Hirota* does not explain why, in cases such as this, the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute.

Munaf v. Geren, 482 F.3d 582, 584 (D.C. Cir. 2007). The panel majority, relying on its reading of *Hirota*, left to this Court "the prerogative of overruling its own decisions." *Id.* at 585 (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). Further, the D.C. Circuit's reading of the case was heavily influenced by its own prior opinion in *Flick v. Johnson*, 174 F.2d 983 (D.C. Cir. 1949). *See Omar v. Harvey*, 479 F.3d 1, 7 (D.C. Cir. 2007).

The government's assertion that there can be no habeas jurisdiction when the United States military is operating as part of a multinational force is not supported by the narrow language employed in *Hirota*, in which this Court held only that it lacked the power to review judgments against the petitioners under the circumstances of that case. *Hirota*, 338 U.S. at 198. Nothing in *Hirota* suggests that the Executive is free to detain a United States citizen and is not amenable to judicial review simply because it acts in concert with foreign governments.

The United States has a special obligation under constitutional law for the protection of its citizens. *See Reid v. Covert*, 354 U.S. 1, 5 (1957). It is for this reason that the Court has recognized that citizenship of the detainee can be a head of habeas corpus jurisdiction, even where the detention takes place within the territorial jurisdiction of a foreign country. *See id.*; *see also Johnson v. Eisentrager*, 339 U.S. 763, 769 (1950) ("The years have not destroyed or diminished the importance of citizenship nor

have they sapped the vitality of a citizen's claims upon his government for protection"). A rule exempting detentions of citizens overseas from judicial review would create precisely the perverse incentive described by Justice O'Connor in *Hamdi*:

> Military authorities faced with the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield will simply keep citizen-detainees abroad. ... It is not at all clear why [presence outside the United States] should make a determinative constitutional difference.

Hamdi, 542 U.S. at 524.

The government expresses concern that habeas corpus jurisdiction would conflict with the Iraqi government's "exclusive jurisdiction" to punish offenses that occur within its sovereign borders. As the ABA pointed out in its amicus brief filed in *Boumediene*, a distinction based on whether detentions by the United States military occurred within or outside of the United States would create a situation "where individual rights are not judicially enforceable, thus undermining the most fundamental attribute of the rule of law." Brief Amicus Curiae of the ABA, *Boumediene v. Bush*, No. 06-1195 (Aug. 24, 2007) at 10. The ABA therefore respectfully asserts that the district court must have jurisdiction to review detentions of United States citizens by its military, regardless of the location of the detention.

CONCLUSION

The American Bar Association respectfully requests that the judgment of the Court of Appeals in *Munaf v. Geren* be reversed, and the judgment of the Court of Appeals in *Omar v. Harvey* be affirmed.

Respectfully submitted,

WILLIAM H. NEUKOM
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
321 N. CLARK STREET
CHICAGO, IL 60610
(312) 988-5000

Of Counsel:
DAVID J. CYNAMON
MATTHEW J. MACLEAN
DARON T. CARREIRO

Attorneys for Amicus Curiae
American Bar Association

(84) 942 (13) (12)

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* M. CHERIF BASSIOUNI AND OTHER INTERNATIONAL LAW PROFESSORS LISTED HEREIN IN SUPPORT OF OMAR et al. AND MUNAF et al.

Richard M. Zuckerman
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 398-5213
Counsel of Record for Amici Curiae

Paula M. Yost
Matt Marostica
Hillary Noll Kalay
Eva López-Paredes
Of Counsel

TABLE OF CONTENTS

Table of Authorities iii

Statement 1

Interest Of *Amici* 2

Summary of Argument 3

Argument 4

A. Extradition is the Exclusive Process By Which the United States May Transfer U.S. Citizens in its Custody and Control (Whether or Not In U.S. Territory) To a Foreign State 4

1. The Due Process Clause Protects U.S. Citizens, Here and Abroad, Against Lawless Or Arbitrary Transfers By The U.S. To A Foreign State 5

2. Any Proposed Transfer Of A U.S. Civilian Citizen To The State of Iraq Can Only Be Done If Authorized By, And In Accordance With, The U.S.-Iraq Extradition Treaty, Which Explicitly Applies to Territory "In The Occupancy And Under The Control Of" The U.S. 10

3. The U.S. Extradition Statute Is Not Limited To Persons Within The Territorial United States. 14

4. There Is No Status of Forces Agreement With Iraq, And No Status of Forces Agreement Could Authorize Transfer Of

A U.S. Civilian Citizen Not Part of the Military 23

B. Extradition Procedures Fully Protect the Interests of the United States, the Foreign State That Seeks Extradition, and the U.S. Citizens Whose Extradition Is Sought. 29

1. The Request for Extradition 34

2. The "Probable Cause" Hearing 34

3. Habeas Corpus in Extradition Proceedings 35

4. The Discretion of the Department of State Not to Extradite 35

Conclusion 37

Appendix A — List of *Amici* ..... a

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. Texas,
441 U.S. 418 (1979) 5

Bisson v. The United Nations,
06-civ-6352, 2007 WL 2154181
(S.D.N.Y. July 27, 2007) 24

Braden v. 30th Judicial Circuit Court of Ky.,
410 U.S. 484 (1973) 15, 16

Collins v. Loisel,
259 U.S. 309 (1922) 35

Cornejo-Barreto v. Seifert,
218 F.3d 1004 (9th Cir. 2000) 35

Cozart v. Wilson,
236 F.2d 732 (D.C. Cir.), *vacated as moot*,
352 U.S. 884 (1956) 26

Emmanuel v. United States,
253 F.3d 755 (1st Cir. 2001) 24

Factor v. Laubenheimer,
290 U.S. 276 (1933) 7

Goldman v. Weinberger,
475 U.S. 503 (1986) 28

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) ..... *passim*

Hirota v. MacArthur,
338 U.S. 197 (1948) 12

Holmes v. Laird,
459 F.2d 1211 (D.C. Cir. 1972)..... 25, 27

In re Burt,
737 F.2d 1477 (7th Cir. 1984) 35

In re Kaine,
14 F. Cas. 84 (C.C.S.D.N.Y. 1852) 33

In re Kaine,
55 U.S. (14 How.) 103 (1852)..... 6, 31, 32

In re McDonald,
16 F. Cas. 33 (C.C.D. Mass. 1866) 33

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17 F. Cas. 232 (S.D.N.Y. 1847)..... 31

Meacham v. Knolls Atomic Power Lab.,
461 F.3d 134 (2d Cir. 2006)..... 11

Mironescu v. Costner,
480 F.3d 664 (4th Cir. 2007) 35, 36

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504 U.S. 374 (1992) 21

National Ass'n of Homebuilders v. Defenders of Wildlife,
127 S. Ct. 2518 (2007) 21

Ntakirutimana v. Reno,
184 F.3d 419 (5th Cir. 1999) 7

Rasul v. Bush,
542 U.S. 466 (2004) 15, 16

Reid v. Covert,
354 U.S. 1 (1957) 6, 28

St. Martin Evangelical Lutheran Church v. South Dakota,
451 U.S. 772 (1981) 21-22

Sullivan v. Everhart,
494 U.S. 83 (1990) 11

Sumitomo Shoji Am., Inc. v. Avagliano,
457 U.S. 176 (1982) 14

Terlinden v. Ames,
184 U.S. 270 (1902) 8

U.S. v. Balsys,
524 U.S. 666 (1998) 36

United States ex rel. Stone v. Robinson,
431 F.2d 548 (3d Cir. 1970) 26, 28

United States ex rel. Wheeler v. Williamson,
28 F. Cas. 686 (C.C.E.D. Pa. 1855) 33

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 7

United States v. Rauscher,
119 U.S. 407 (1886) 7

United States v. Robins,
27 F. Cas. 825 (D.S.C. 1799) 31, 37

Valentine v. United States ex rel. Neidecker,
299 U.S. 5 (1936) .....*passim*

Vo v. Benov,
447 F.3d 1235 (9th Cir. 2006) 30

Williams v. Rogers,
449 F.2d 513 (8th Cir. 1971) 25-26, 27-28

Wilson v. Girard,
354 U.S. 524 (1957) .....*passim*

CONSTITUTION, TREATIES, STATUTES, RULES AND REGULATIONS

U.S. Constitution, Art. II, § 2, cl. 2 30

Extradition Act of 1848, Act of August 12,
1848, Ch. 167 § 5, 9 Stat. 302, 303..... 4, 30, 31

Foreign Affairs Reform and Restructuring Act of
1998 P.L. 105-277 §1301,
codified at 8. U.S.C. §§ 1101 *et seq*..... 36

U.S. - Iraq Extradition Treaty,
49 Stat. 3380 (made June 7, 1934,
entered into force April 23, 1936) ... 4-5, 10, 11, 34

U.S. - Dominican Republic Extradition Treaty,
36 Stat. 2468 11

U.S. - El Salvador Extradition Treaty,
37 Stat. 1516 11

U.S. - Venezuela Extradition Treaty,
43 Stat. 1698 11

U.S. - Romania Extradition Treaty,
44 Stat. 2020 (made July 23, 1924,
entered into force April 7, 1925) 19, 20

U.S. - Albania Extradition Treaty,
49 Stat. 3313 11

U.S. - Lichtenstein Extradition Treaty,
50 Stat. 1337 11

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50 Stat. 1349 (made Nov. 10, 1936,
entered into force July 27, 1937) 19-20

5 U.S.C. § 704 (2000) 36-37

8 U.S.C. §§ 1101 *et seq.* 36

8 U.S.C. § 1231(a) 36

10 U.S.C. Chapter 47 28

18 U.S.C. § 1381(a) 10

18 U.S.C. § 3181(b) 10

18 U.S.C. §§ 3181 *et. seq.* ..... *passim*

18 U.S.C. § 3183 ..... 14, 34

18 U.S.C. § 3184 ..... *passim*

18 U.S.C. § 3185 17

18 U.S.C. § 3186 ..... 33, 35-36

18 U.S.C. § 3196 ..... 33, 35-36

28 U.S.C § 1291 35

28 U.S.C. § 2241 16

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N.Y. TIMES, Jan. 25, 2008 24

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11 FOREIGN AFFAIRS MANUAL 723.3 (2006) 26

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3 U.S. Op. Atty. Gen. 661 (1841) 9

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6 U.S. Op. Atty. Gen. 148 (1853) 7, 9

The President's Authority to Force the Shah to
Return to Iran, 4A U.S. Op. Off. Legal
Counsel 149 (1979) 9

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STATEMENT

M. Cherif Bassiouni and the other International Law Professors listed herein respectfully submit this *amicus* brief[1] in support of Respondents Sandra K.

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended (cont'd)

Omar and Ahmed S. Omar, as next friends of Shawqi Ahmad Omar, urging that this Court affirm the judgment in No. 07-394, and in support of Petitioner Maisoon Mohammed, as next friend of Mohammad Munaf, urging that this Court reverse the judgment in No. 06-1666.

INTEREST OF *AMICI*

Amici are professors who teach international law, including the law of extradition. *Amici* share the firm belief that the law of extradition—which has been developed over centuries to balance the interests of countries requesting extradition, the countries to which such requests are made, and the persons whose extradition is sought—applies in these cases, and should not be disregarded.

Amici represent a wide range of experiences and backgrounds. Many *amici* are practitioners who have litigated extradition cases. *Amici* have published and lectured extensively on extradition. *Amici* sign this brief in their individual capacities.

Many of the *amici* have been honored to submit *amicus* briefs in other cases in this Court, including in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

A list of the *amici* appears as Appendix A.

(cont'd)
to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

SUMMARY OF ARGUMENT

Extradition is the exclusive process by which the United States may transfer one of its civilian citizens, in its effective control of custody (whether or not within U.S. territory), to a foreign state for criminal prosecution. Any transfer of Messrs. Omar and Munaf, who are U.S. civilian citizens, from effective U.S. control or custody to Iraqi custody can only be done through extradition. Any extradition must be done in compliance with the U.S.-Iraq Extradition Treaty—which, by its terms, applies not only to the territory of each country but also to any regions "*in the occupancy and under the control*" thereof—and the clear and the well-established framework for extradition established under U.S. statutes and practice. That extradition process must be used during times of armed conflict, as well as during times of peace.

The procedures and substantive provisions of the U.S.-Iraq Extradition Treaty and the U.S. Extradition Act will fully protect the interests of all parties—the United States, the State of Iraq, and the U.S. civilian citizens who are the subject of the proceedings.

ARGUMENT

A. EXTRADITION IS THE EXCLUSIVE PROCESS BY WHICH THE UNITED STATES MAY TRANSFER U.S. CITIZENS IN ITS CUSTODY AND CONTROL (WHETHER OR NOT IN U.S. TERRITORY) TO A FOREIGN STATE

For the past 160 years, since Congress enacted the Extradition Act of 1848,[2] extradition has been the exclusive process by which the U.S. government may surrender one of its civilian citizens to a foreign government for criminal prosecution. Nothing in the body of extradition law provides an exception to that process when the U.S. civilian citizen is under the effective control or custody of the U.S. extraterritorially.

The Federal Parties' principal argument against extradition—that "the transfer of a person *within* a foreign country is not an extradition"—is wrong. (Fed. Parties Br. at 44). Whether the law of extradition applies does not depend upon the location of the U.S. citizens, but upon whether the U.S. is exercising effective control or custody over its own citizens who are sought by a foreign state.

Indeed, the U.S.-Iraq Extradition Treaty explicitly applies to areas outside the territorial jurisdiction of the U.S. that are "*in the occupancy and under the control of*" the United States, 49 Stat.

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[2] Act of August 12, 1848, Ch. 167 § 5, 9 Stat. 302, 303.

3380 (made June 7, 1934, entered into force April 23, 1936). The U.S. extradition statute applies, as well, to U.S. citizens in any area under U.S. control. 18 U.S.C. § 3184.

Here, the proposed transfer of U.S. citizens would be from U.S. custody to Iraqi custody. Under due-process requirements, the terms of the U.S.-Iraq Extradition Treaty, and the extradition statute, there is no mechanism, other than extradition, by which the U.S. Executive may effect that transfer.

1. The Due Process Clause Protects U.S. Citizens, Here and Abroad, Against Lawless Or Arbitrary Transfers By The U.S. To A Foreign State

"[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (O'Connor, J., plurality op.) (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (deprivation of the physical liberty protected by the Fifth Amendment "for any purpose ... requires due process protection"). Neither "the circumstances of war [n]or the accusation of treasonous behavior" can "offset" this entitlement. *Hamdi*, 542 U.S. at 530 (O'Connor, J., plurality op.).

This core principle of due process applies to extradition—which encompasses both detention for the purpose of transfer to another sovereign and then continued detention, after transfer, for a duration determined by that other sovereign:

> [T]he Constitution creates no executive prerogative to dispose of the liberty of the individual ... There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 9 (1936). *Valentine* rests on both due process and separation of powers grounds, requiring judicial review to test the legality and constitutionality of a transfer. "[A]n extradition without an unbiased hearing ... ought never to be allowed in this country." *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852) (plurality op. of Catron, J.).

The Due Process Clause protects U.S. citizens both inside and outside the U.S. *Id.*; *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J., plurality op.).

> Whatever power the United States Constitution envisions for the Executive in exchanges with other nations ... it most assuredly envisions a role for all three branches when individual liberties are at stake.

Hamdi, 542 U.S. at 536 (O'Connor, J., plurality op.).

The *Valentine* rule further embodies separation of powers principles, reflecting the need for inter-branch responsibilities in decisions to deprive a person of liberty and to send him or her to face trial by a foreign sovereign. *See Valentine*, 299 U.S. at 8 ("[A]lbeit a national power, [extradition] is not confided to the Executive in the absence of treaty or legislative provision.")[3]; *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he legal right to demand [a person's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty"); *United States v. Rauscher*, 119 U.S. 407, 420 (1886) (Executive lacks power to extradite if offense is not on list of extraditable offenses); 6 U.S. Op. Atty. Gen. 148, 155 (1853) (Executive's power to extradite is "derived from the treaty-making power"); *Ntakirutimana v. Reno*, 184 F.3d 419, 424-25 (5th Cir. 1999).

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[3] *Valentine* was decided the same year as *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). In *Curtiss-Wright*, the Court put emphasis on "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Id.* at 320. The Court went on to hold that legislation which granted wide discretion to the president in deciding when and to whom weapons could be sold was not an invalid delegation of Congressional power. *Id.* at 328. Thus, the same year that this Court recognized the "delicate, plenary and exclusive power" of the President in the field of international relations, this Court also recognized the need for inter-branch responsibilities in the extradition process. *Valentine*, 299 U.S. at 8.

In the absence of statutory or treaty authority—and in cases where the transfer would exceed the legislative grant of authority—the courts are obliged to deny transfer:

> Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.

Valentine, 299 U.S. at 18; *accord Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

Principles of separation of powers and the requirements of due process are tethered to, and reinforce, each other: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi*, 542 U.S. at 544-55 (J. Scalia, diss. op.), citing and quoting William Blackstone, 2 COMMENTARIES 131-33, and detailing the evolution of the writ of habeas corpus as a "tool for challenging executive confinement." *Id.* at 557. The requirement of a law to justify a particular individual's detention precludes precipitous unilateral action by the Executive against the individual (and political tyranny), while providing the judiciary a measure against which to test a claimed urgent need to detain—notwithstanding the Federal Parties' claim that such

is beyond the competence of the judiciary. (Fed. Parties Br., p. 28). *See Hamdi* at 560-6.

The Executive has itself long recognized *Valentine*'s separation of powers foundation as a check on its own authority to detain and deliver persons to foreign states. In 1833, then Attorney General Taney concluded that the transfer of two alleged pirates to Portuguese custody could not proceed because "[t]here is no law of Congress which authorizes the President to deliver up any one found in the United States who is charged with having committed a crime against a foreign nation." 2 U.S. Op. Atty. Gen. 559 (1833); *see also* 6 U.S. Op. Atty. Gen. 148, 155 (1853) (stating the Executive's power to extradite is "derived from the treaty-making power"). In 1841 and 1853, Attorneys General H. S. Legaré and Caleb Cushing reached the same conclusion. *See* 3 U.S. Op. Atty. Gen. 661, 661-662 (1841) (Legaré); 6 U.S. Op. Atty. Gen. 85, 86 (1853) (Cushing). As recently as 1979, the Office of Legal Counsel confirmed this position. *See The President's Authority to Force the Shah to Return to Iran*, 4A U.S. Op. Off. Legal Counsel 149, (1979) ("[t]he President cannot order any person extradited unless a treaty or a statute authorizes him to do so.").

2. Any Proposed Transfer Of A U.S. Civilian Citizen To The State of Iraq Can Only Be Done If Authorized By, And In Accordance With, The U.S.-Iraq Extradition Treaty, Which Explicitly Applies to Territory "In The Occupancy And Under The Control Of" The U.S.

Consistent with *Valentine*, the extradition statute is explicit that a U.S. citizen may be extradited to the custody of a foreign government "only during the existence of any treaty of extradition with such foreign government." 18 U.S.C. § 3181(a).[4]

There is an extradition treaty between the U.S. and Iraq, 49 Stat. 3380 (signed June 7, 1934, entered into force April 23, 1936) made with the advice and consent of the Senate, which the Department of State maintains is in force. *Bilateral Treaties in Force*, § I, p.129 (January 1, 2007).

The Federal Parties selectively quote from the U.S.-Iraq Extradition Treaty, stating that it only applies to persons "*who shall be found within the territories of the other High Contracting Party*." (Fed.

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[4] In contrast, under 18 U.S.C. § 3181(b), persons other than citizens, nationals, and permanent residents of the U.S. can be extradited for "crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government" if specific requirements are met.

Parties Br. at 41) (Federal Parties' emphasis). But that language, in Article I of the Treaty, which sets forth the reciprocal undertaking to surrender, must be read together with Article XI of the Treaty, which defines the "territory" in which all undertakings of the Treaty apply. Article XI provides:

> The stipulations of this Treaty shall be applicable to *all territory wherever situated*, belonging to either of the High Contracting Parties or *in the occupancy and under the control of either of them, during such occupancy or control.*

Art. XI, 49 Stat. at 3383 (emphasis added).[5] Article XI thus defines the "territory" to which Article I applies. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 150 (2d Cir. 2006) (same words in two sections of the same statute must be interpreted in *pari materia*, "that is, as having the same meaning"); *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990).

As U.N. Security Council Resolution 1483, the first post-invasion resolution, indicated, the U.S. accepted the "responsibilities and obligations under applicable international law [of] ... occupying

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[5] Some other extradition treaties use the same definition of territory. *See, e.g.*, Albania, 49 Stat. 3313, Art. XI; Dominican Republic, 36 Stat. 2468, Art. XI; El Salvador, 37 Stat. 1516, Art. XI; Lichtenstein, 50 Stat. 1337, Art. XI; Venezuela, 43 Stat. 1698, Art. XI (treaty applies to "all territories wherever situated, belonging to either of the Contracting Parties or under the jurisdiction or control of either of them").

powers." S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) (punctuation omitted). The U.S. continues to occupy and control the areas of Iraq in which Messrs. Omar and Munaf are held.

> Although the formal occupation of Iraq ended on June 28, 2004, to the extent that the United States and other foreign troops operating in Iraq continue to wield effective control over Iraqis and Iraqi property, they are bound by this body of laws.

Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION xiv-xv (rev. ed. 2004); *accord* Andrea Carcano, End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty To the Interim Iraqi Government, 11 J. CONFLICT & SECURITY L. 41, 58 (2006).

Indeed, under the terms of Article XI of the U.S.-Iraq Extradition Treaty—which applies during "occupancy *or* control" (emphasis added), even if formal occupancy had ended—because the U.S. remains in "control" of the areas of Iraq where Messrs. Omar and Munaf are held, the Treaty applies.

Thus, by its terms, the U.S.-Iraq Extradition Treaty applies to Messrs. Omar and Munaf—civilian citizens held by the U.S. in territory under U.S. occupancy and control. Any comparison to the U.S. troops acting on behalf of the International Military Tribunal for the Far East (as was at issue in *Hirota*

v. MacArthur, 338 U.S. 197 (1948)) is fundamentally misplaced. (*See* Habeas Petitioners' Br. at 35-44.)[6]

Of course, as part of the extradition process, Mr. Omar and Mr. Munaf must be afforded an opportunity to argue—as any subject of any extradition may do—that there should be no extradition. Their arguments may include arguments that the U.S.-Iraq Extradition Treaty does not authorize their extradition.[7] It would be premature for this Court to contemplate what those arguments might be, or to address the merits of those arguments, and *amici* do not do so. It is sufficient for this Court to determine, at this stage of the proceedings, that if there is to be any transfer of Mr. Omar or Mr. Munaf to the Iraqi government, it may

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[6] The Federal Parties argue that U.S. courts lack authority to block the MNF-I from surrendering custody of Messrs. Omar and Munaf to Iraqi authorities. (Fed. Parties Br. at 36). This attempt to mask the fact of U.S. custody of Messrs. Omar and Munaf behind the façade of the MNF-I cannot withstand scrutiny. The U.S. military in Iraq is under the command and control of President Bush, as Commander-in-Chief. In his capacity as Commander-in-Chief, President Bush ordered U.S. troops to Iraq. Those troops are under the unified command of the U.S. military; they are not commanded or controlled by the United Nations or any other international body. Similarly, the U.S. is not acting pursuant to the authority of the United Nations nor that of any other international body. Troops that operate under the direction of President Bush and the U.S. military, not MNF-I, control the custody of Messrs. Omar and Munaf.

[7] Interpretation of treaties is a judicial process. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

only be done in accordance with the U.S.-Iraq Extradition Treaty.

3. The U.S. Extradition Statute Is Not Limited To Persons Within The Territorial United States.

The U.S. extradition statute similarly applies to areas outside the United States but under its occupancy or control, 18 U.S.C. §§ 3181 *et. seq*.

First, 18 U.S.C. § 3181, which defines the scope of the statute, does not limit its applicability to the territorial jurisdiction of the U.S. Instead, it simply states, in pertinent part:

> The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

Second, the fact that the extradition statute applies to U.S. citizens who are under the effective control or custody of the U.S. but who are held outside the U.S. is made explicit in 18 U.S.C. § 3183, which applies:

> Whenever the executive authority of any State, Territory, District, or possession of the United States demands any American citizen or national as a fugitive from justice who has fled to a country in which the United States exercises extraterritorial jurisdiction * * *.

Third, the section of the extradition statute that applies here, 18 U.S.C. § 3184, which governs extradition of a person to a foreign country with which the U.S. shares an extradition treaty, contains no limitation to persons within the territorial bounds of the U.S. The only requirement is that the person be "found within [the] jurisdiction" *of the judge* to whom the extradition request is made. That requirement is comparable to the jurisdictional requirement of the habeas corpus statute. *Rasul v. Bush,* 542 U.S. 466, 478 (2004); *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 495 (1973).

Section 3184 thus states, in part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging *any person found within his jurisdiction,* with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and

> considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States.

18 U.S.C. § 3184 (emphasis added). The statute's jurisdictional language—providing that a warrant may be issued by a judge with respect to "*any person found within his jurisdiction*"—thus parallels that of the habeas statute, which provides that, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U.S.C. § 2241 (emphasis added).

The language of the habeas statute has long been construed to vest jurisdiction in any court in the jurisdiction of which the custodian is found. *Rasul v. Bush,* 542 U.S. at 478; *Braden,* 410 U.S. at 495. In the habeas context, the basis for holding that a court having jurisdiction over the custodian may entertain a petition is that such court may provide effective relief, by directing the custodian to release the petitioner. 410 U.S. at 494-95. Similarly, when extradition is sought, the critical issue is whether the judge before whom the extradition application is made has jurisdiction to order effective relief—*i.e.,* to "issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that

the evidence of criminality may be heard and considered." 18 U.S.C. § 3184.

Here, Messrs. Omar and Munaf are in the custody of the Secretary of the Army and U.S. Army officers who are subject to the jurisdiction of the U.S. District Court for the District of Columbia. That court has jurisdiction to hear an application for extradition, because it can render effective relief: Granting, or denying, an application for the arrest and delivery of Messrs. Omar and Munaf to the custody of the foreign state seeking extradition.

The Federal Parties' principal argument against extradition—that "the transfer of a person *within* a foreign country is not an extradition"—is wrong. (Fed. Parties Br. at 44). A proposed transfer of the effective control or custody of a person from one State to another is extradition—whether or not it involves crossing a border. Here, the proposed transfer of a U.S. citizen would be from U.S. custody to Iraqi custody. The fact that the transfer would be from a section of Iraq that is under the control of the U.S., to a section of Iraq that is under the control of the State of Iraq, does not alter this analysis.

The extraterritorial scope of the U.S. extradition statute is also reflected in 18 U.S.C. § 3185, which provides for extradition from the U.S. to "any foreign country or territory ... occupied by or under the control of the United States" of persons who committed one of specific enumerated offenses in such territory and are thereafter found in the United States.

Both in contemporary practice, and historically, the definition of "extradition" is not confined by location:

> Extradition in contemporary practice means a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, comity, or on the basis of national legislation.

M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (5th ed. 2007) ("Bassiouni, INT'L EXTRADITION") at 1. *See also* 1 John Bassett Moore, *A Treatise on Extradition and Interstate Rendition* 4 (1891) ("[E]xtradition may be defined as the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed."); Samuel T. Spear, *The Law of Extradition, International and Inter-State* 70 (3d ed. 1885) (defining extradition as "the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction").

This application of the law of extradition is consistent with international law, which makes whichever country has "effective control" over detainees responsible for their manner of detention, and for providing all rights due them.[8] When the

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[8] See Int'l Law Comm'n, Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and (cont'd)

U.S. has "effective control" of its own citizens detained abroad, it is responsible not only for the manner of their detention, but whether they should be subject to extradition to the custody of a foreign state.

This is perhaps best illustrated by posing this question: If Romania gave credence to the allegations against Mr. Munaf [9]—to wit, that he participated in the kidnapping of three Romanian journalists with whom he traveled from Romania to Iraq—how would Romania go about securing his extradition to Romania? The State of Iraq lacks effective control and custody of Mr. Munaf, and thus could not extradite him to Romania. If Romania wanted to seek the extradition of Mr. Munaf, it could only do so by making an extradition request to the U.S., under the Extradition Treaty between Romania and the U.S., 44 Stat. 2020 (made July 23, 1924, entered into force April 7, 1925), supplemented by 50 Stat. 1349 (made Nov. 10, 1936, entered into force July 27,

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(cont'd)

7 Adopted by the Drafting Committee, Art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004).

[9] Apparently, Romania gives no credence to the allegations against Mr. Munaf. Romania—which presumably would have an intense interest in bringing to justice those persons who kidnapped Romanian nationals—has not sought Mr. Munaf's extradition, and has insisted that U.S. Army Lieut. Robert M. Pirone, who stated that he was acting on behalf of Romania when he appeared before the CCCI, had no authority to do so. *See* Habeas Petitioners Br. at 12-13 n. 8.

1937).[10] That is because only the U.S. would have the ability to grant extradition, and, in fact, transfer custody of Mr. Munaf to Romania (assuming all applicable treaty and statutory standards were met).

Applying the law of extradition to this case supports, rather than undermines, the Federal Parties' concern that "The proper functioning of the CCCI [Central Criminal Court of Iraq] has been a key concern of [Multinational Force-Iraq] in promoting stability and security in Iraq, given that '[e]stablishing the rule of law is the cornerstone of a free and democratic society.'" (Fed. Parties Br. at 4). If Iraq seeks to have the U.S. transfer a U.S. citizen to the State of Iraq for prosecution in the CCCI or, as in Mr. Munaf's case, for carrying out a death sentence already imposed by the CCCI, Iraq should ask nothing more than that the U.S. follow the same procedures that the U.S. would follow if such custody were sought by, *e.g.*, Romania, or the United Kingdom, or France, or any other country with which the U.S. has an extradition treaty. None of those countries would expect the U.S. to transfer custody of a U.S. citizen without following the procedures set forth by treaty and statute. None of those countries would transfer their own citizens to the U.S. (if at all) without following their own treaty and statutory

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[10] As is true of the U.S.-Iraq Extradition Treaty, Article XI of the U.S.-Romania Extradition Treaty provides that the treaty "shall be applicable to all territory wherever situated, belonging to either of the High Contracting Parties or in the occupancy and under the control of either of them, during such occupancy or control." 44 Stat. 2020.

procedures. Far from according respect to the State of Iraq, the position taken by the Federal Parties fails to treat Iraq as a coequal sovereign.

Neither the Authorization of the Use of Military Force in Iraq, nor the fact that there is an armed conflict of an international character in Iraq, abrogates the applicability of extradition law.

Nothing in the Authorization suggests, in the slightest way, that it was intended to permit the transfer of U.S. citizens to Iraqi custody. Indeed, so construing the general language of the Authorization would imply a repeal of the clear rights afforded by the specific language of the Extradition Act, contrary to settled canons of statutory interpretation. *See National Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) ("We will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act" 'or unless such a construction is 'absolutely necessary'"); *Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general..."). The Authorization reflects no "clear and manifest" intent to repeal the law of extradition; nor is such a construction "absolutely necessary" to give it meaning here. *National Ass'n*, 126 S. Ct. at 2532. Indeed, because the due process components of extradition are rooted in the Constitution, the Authorization *could not* abrogate those requirements (especially because the Authorization does not even attempt to provide alternate constitutionally-adequate procedures to accord rights protected by the Due Process Clause). *See St. Martin Evangelical Lutheran Church v.*

South Dakota, 451 U.S. 772, 788 (1981) ("The long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions...").

An armed conflict of an international character does not suspend extradition law. Article 45 of the Fourth Geneva Convention, which applies here, clearly envisages and endorses the continued application of extradition treaties during time of war or other armed conflict. Article 45 provides, in part:

> The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva, August 12, 1949), Art. 45. The Commentary to Article 45 states:

> The meaning of this reservation is quite clear: it is intended to ensure that the system of extradition functions normally. * * * It was * * * important to preserve the existing character of extradition as an act of penal procedure and to prevent it serving as a pretext for persecution.

Neither "the circumstances of war [n]or the accusation of treasonous behavior" can "offset" the rights of Messrs. Omar and Munaf, as U.S. citizens, to the due process protection that extradition

procedures afford. *Hamdi*, 542 U.S. at 530 (O'Connor, J., plurality op.).

4. There Is No Status of Forces Agreement With Iraq, And No Status of Forces Agreement Could Authorize Transfer Of A U.S. Civilian Citizen Not Part of the Military

In reliance upon *Wilson v. Girard*, 354 U.S. 524 (1957), the Federal Parties' argue that "[s]ettled practice with status of forces agreements" supports their view that the proposed transfer need not follow extradition practice. (Fed. Parties Br. at 43.) To the contrary, *Wilson* merely establishes that when there is a status of forces agreement that *has been authorized by a treaty made with the advice and consent of the Senate,* that agreement can establish procedures—grounded in treaty and statute—as an alternative to extradition, for the transfer of members of the U.S. armed forces to a foreign state. Nothing in *Wilson* authorizes the transfer of U.S. citizens who are not part of the U.S. military by any procedure other than extradition. Nothing in *Wilson* authorizes the transfer of members of the U.S. armed forces, by any procedure other than extradition, where there is no status of forces agreement specifically authorized by, or embodied in, a treaty.

Here, there is no status of forces agreement currently in effect between the U.S. and Iraq,[11] or between the United Nations and Iraq.[12]

In *Wilson v. Girard*, William Girard, an American serviceman stationed in Japan, sought habeas review to prevent his transfer to Japanese authorities for prosecution. 354 U.S. 524, 525 (1957). The U.S. had entered a Security Treaty with Japan, with the advice and consent of the Senate, that specifically authorized the making of an Administrative Agreement between the two Governments concerning the conditions governing the disposition of U.S. armed forces in Japan. *Id.* 526. The Senate reviewed and considered the terms of the Administrative Agreement before consenting to the treaty. *Id.* at 527. The Administrative Agreement established a procedure under which the U.S. could waive its right to exercise jurisdiction over members of the U.S. armed forces and their civilian staff for crimes arising out of any act or omission

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[11] *See* H.R. Con. Res. 231, 110th Cong. (2007): Expressing the sense of Congress that the Government should submit to the Government of Iraq a draft bilateral status of forces agreement; Thom Shanker and Steven Lee Myers, *U.S. Asking Iraq for Wide Rights on War*, N.Y. TIMES, Jan. 25, 2008, at A1.

[12] The United Nations has entered into status of forces agreements with countries to which it sends peacekeeping forces but, there is no such agreement with Iraq. *See, e.g.*, *Emmanuel v. United States*, 253 F.3d 755 (1st Cir. 2001) (reviewing the status of forces agreement between the United Nations and Haiti); *Bisson v. The United Nations*, 06-civ-6352, 2007 WL 2154181 (S.D.N.Y. July 27, 2007).

done in the performance of official duties committed in Japan. *Wilson*, 354 U.S. at 528. After reviewing the Agreement, the Senate consented to the Treaty. *Id.* at 527.

This Court found that pursuant to the Security Treaty, Girard could lawfully be transferred to Japanese authorities for trial, finding "no constitutional or statutory barrier" to the treaty. *Id.* at 530. The Court justified its finding "in light of the Senate's ratification of the Security Treaty" after the Senate had considered the Administrative Agreement, finding that the Treaty, consented to by the Senate, "authorized the making of the Administrative Agreement." *Id.* at 528-29.

Each of the cases cited by the Federal Parties for the proposition that the "[s]urrender of American servicemen for foreign trial pursuant to status of forces agreements has received consistent judicial approval" (Fed. Parties Br. at 43-44) involved a status of forces agreement that was either part of a treaty entered into with the advice and consent of the Senate, specifically authorized by a treaty consented to by the Senate, or specifically authorized by joint resolution of Congress. *See Wilson*, 354 U.S. 524 (Security Treaty with Japan, Senate's advice and consent provided on March 20, 1952); *Holmes v. Laird*, 459 F.2d 1211, 1219 (D.C. Cir. 1972) (NATO Status of Forces Agreement, Senate's advice and consent provided on July 15, 1953, and Supplementary Agreement, Status of Forces in the Federal Republic of Germany Agreement, August 3, 1959); *Williams v. Rogers*, 449 F.2d 513, 520 n. 12 (8th Cir. 1971) (Military Bases in the Philippines

Agreement, specifically authorized by joint resolution of Congress, June 29, 1944); *Cozart v. Wilson,* 236 F.2d 732, 733 (D.C. Cir. 1956), *vacated as moot,* 352 U.S. 884 (1956) (Security Treaty with Japan, made with the advice and consent of the Senate on March 20, 1952); *United States ex rel. Stone v. Robinson,* 431 F.2d 548 (3d Cir. 1970) (Security Treaty with Japan, made with the advice and consent of the Senate on March 20, 1952).

It is only such explicit Congressional authorization that allows status of forces agreements to provide a process, as an alternative to extradition, for the transfer of a U.S. citizen who is a member of the military to a foreign state for criminal proceedings.[13]

Wilson does not stand for the proposition that Messrs. Omar and Munaf must identify a treaty or statute barring a transfer. (Fed. Parties Br. at 38-39). Rather, *Wilson* and its progeny establish that the U.S. cannot transfer custody of one of its citizens to a foreign state *without* a treaty and statute

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[13] It is the position of the Department of State that, in determining whether to enter an international agreement pursuant to a treaty or executive agreement, one of the factors to be considered is "*whether the agreement can be given effect without the enactment of subsequent legislation by the Congress.*" U.S. Dep't of State Foreign Affairs, 11 FOREIGN AFFAIRS MANUAL 723.3 (2006) (emphasis added).

Consistent with *Wilson*, *supra*, a status of forces agreement can provide an alternative to extradition procedures only if the agreement is done with Congressional authorization.

authorizing such a transfer. If a valid status of forces agreement, *authorized by, or part of, a treaty made with the advice and consent of the Senate,* exists, the transfer can be effected pursuant to that treaty and agreement. If there is no such valid status of forces agreement, authorized by treaty, present and applicable to the particular U.S. citizen, the transfer can only be done pursuant to an extradition treaty and the implementing statutes. *See, e.g., Williams v. Rogers*, 449 F.2d at 523 (in analyzing the Military Bases in the Philippines Agreement, the Court concluded that Williams was "not being unlawfully extradited"); *see also Holmes v. Laird*, 459 F.2d at 1219 n. 59 ("[i]t is certainly the law that the power of the Executive Branch to invade one's personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty.").

The Federal Parties conclude their discussion of status of forces agreements by pointing out that this case "does not involve members of the United States military who have committed criminal offenses in Iraq." (Fed. Parties Br. at 44.) But that is simply another reason why the law of extradition applies.

Status of forces agreements can govern the rights of members of the U.S. armed forces, but cannot govern the rights of U.S. civilians.[14] *See, e.g.*,

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[14] In limited respects, a status of forces agreement can contain provisions relating to civilian dependents and support staff of the military.

Williams, 449 F.2d at 521; *Stone*, 431 F.2d at 553. "[T]he military is, by necessity, a specialized society separate from civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974).) "The essence of military service is the subordination of the desires and interests of the individual to the needs of the service." *Goldman*, 475 U.S. at 507. The policy in distinguishing the rights of those in the armed forces from those of civilians is evident in the Uniform Code of Military Justice (UCMJ), which applies to all members of the Uniformed Services, and sets forth laws providing for different procedural and due process rights as those conferred to civilians. *See* 10 U.S.C. Chapter 47. In *Reid v. Covert*, 354 U.S. 1 (1957), this Court, in concluding that provisions of the UCMJ extending court-martial jurisdiction to persons accompanying the armed forces could not be constitutionally applied to the trial of civilians, noted that military law is "substantially different from the law which governs civilian society. Military law ... emphasizes the iron hand of discipline more than it does the even scales of justice." 354 U.S. at 38.

Not only is *Wilson* inapposite, but it compels the conclusion that civilians such as Messrs. Omar and Munaf be accorded their due process rights and the protections of the law of extradition.

Although this case does not involve members of the U.S. military, what if it did? What if the CCCI sought custody of two U.S. citizens serving in Iraq in the U.S. armed forces, in the custody of the U.S. armed forces (whether acting on their own, or on behalf of MNF-I)? If there were a status of forces

agreement between the U.S. and Iraq, authorized by treaty, the question of whether custody would be transferred, and the procedures for such transfer, would be governed by the treaty and status of forces agreement. In the absence of such a status of forces agreement, *amici* certainly hope that the Federal Parties would not contend that U.S. citizens, serving in the U.S. armed forces, could be transferred from U.S. custody and control (or MNF-I custody) to the custody of the Iraqi government without being accorded basic due process protections through extradition.

B. Extradition Procedures Fully Protect the Interests of the United States, the Foreign State That Seeks Extradition, and the U.S. Citizens Whose Extradition Is Sought.

The Extradition Act sets out the procedures by which the United States may deliver to, or request from, another sovereign country an individual who is suspected, or has been convicted, of committing a crime.

These procedures are simple and straightforward: (1) there must be a treaty of extradition between both countries specifying the circumstances and methods by which extraditions occur; (2) the executive of the requesting country requests extradition under the applicable treaty; (3) a complaint is filed in the district court with jurisdiction; (4) the district court will then hold a hearing to evaluate (a) if there is probable cause to sustain the charge against the individual and (b) if

other treaty conditions have been met; (5) upon a finding of probable cause, the court will issue a certificate of extraditability; (6) a petition for a writ of habeas corpus may be considered, and (7) finally, the Department of State makes the ultimate decision of whether to sign the order of extradition. Bassiouni, INT'L EXTRADITION Ch. IX, § 2; *Restatement (Third) of Foreign Relations Law* § 478.

In devising this process, Congress sought to preserve the system of checks and balances and the constitutional doctrine of separation of powers by involving all three branches of the government. Bassiouni, INT'L EXTRADITION at 58-61. The Executive retains primacy by virtue of its power to make treaties and ultimately by its ability to decide whether or not to sign the order of extradition.[15] The role of the legislature is limited to providing "advice and consent" regarding treaties. U.S. Constitution, Art. II, § 2, cl. 2. The judiciary determines whether there exists an applicable treaty authorizing extradition, and evaluating whether probable cause exists to extradite.[16]

The history and purpose of the Extradition Act of 1848 is reflected in a line of three legal opinions:

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[15] The Executive, in addition, is obligated to consider whether a person subject to extradition would be tortured and cannot extradite a person if substantial grounds exist to believe that person would be tortured. *See infra* p. 36.

[16] *Vo v. Benov*, 447 F.3d 1235, 1237-38 (9th Cir. 2006) (describing role of the courts in extradition).

United States v. Robins, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175), *In re Metzger*, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9,511), and *In re Kaine*, 55 U.S. (14 How.) 103 (1852). Bassiouni, INT'L EXTRADITION at 50.

In *Robins*, a U.S. citizen was arrested for suspicion of murder aboard a British ship and sought habeas relief from being transferred to British authorities for trial. 27 F. Cas. 825 (No. 16,175). The transfer was pursuant to Jay's Treaty of 1794, which provided that any person who committed a crime within one jurisdiction, yet sought asylum in the other, be transferred to the jurisdiction in which the suspected crime occurred for trial. *Id.* While this treaty received the Senate's "advice and consent," it was not implemented pursuant to legislation. Bassiouni, INT'L EXTRADITION at 51. Chief Justice John Marshall, then a member of Congress, concluded that once the executive had entered into an agreement with a foreign nation to transfer an individual to the custody of another nation, whether to transfer that individual was not subject to judicial review. 27 F. Cas. 825 (No. 16,175); Bassiouni, INT'L EXTRADITION at 54-55. In *Metzger*, the Supreme Court similarly concluded that it lacked jurisdiction to issue a writ of habeas corpus to review a district court's decision to commit an individual claimed by the French government based upon an agreement between the U.S. and France. 17 F. Cas. 232.

Robins and *Metzger* engendered enormous popular opposition, and led to the enactment of the Extradition Act of 1848. As this Court stated in *Kaine*, decided after the enactment of that Act:

> [A] great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison and surrender, a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary.

Kaine, 55 U.S. (14 How.) at 112. The Federal Parties ask this Court to sweep aside nearly two centuries of extradition law, stating that to do otherwise would undermine the Executive's authority in foreign affairs, thereby interfering in the relationships between the U.S. and foreign countries. But those concerns have been present throughout the entire period of time that international extradition law has developed. Congress has amended and revised the Extradition Act numerous times, always maintaining the delicate balance of powers, and always maintaining a role for the judiciary.

The authority of the Executive is not, in any way, undermined by the well-defined role played by the judiciary in extradition. *Valentine* necessarily entails a role for the federal courts in transfers to other sovereigns. Describing Congress' first statutory provision for judicial review of transfers to other sovereigns, enacted in 1848, Justice Catron observed that Congress "obviously proceeded on this public opinion" and "thereafter referred foreign powers to the judiciary." *Kaine*, 55 U.S. at 113. Judicial protection of this Due Process entitlement consequently is guaranteed by the Suspension

Clause. *See In re Kaine*, 14 F. Cas. 84, 87 (C.C.S.D.N.Y. 1852) (No. 7,598) ("A stipulation in the [extradition] treaty prohibiting [habeas corpus] jurisdiction, equally with a like enactment in a statute, would be void, as in opposition to the constitution. The treaty-making power of Congress is not competent to suspend the writ of habeas corpus in time of peace."); *accord United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 686, 688 (C.C.E.D. Pa. 1855) (No. 16,726); *In re McDonald*, 16 F. Cas. 33, 35-36 (C.C.D. Mass. 1866) (No. 8,752).

In addition to upsetting the balance between the executive, legislative, and judicial branches that has been developed in the law of extradition, the position of the Federal Parties in this case—the Secretary of the Army, and officers of the U.S. armed forces—improperly seeks to expand the authority of the Department of Defense, and diminish the authority of the Department of State, within the executive branch. Discretion of whether or not to proceed with extradition of a U.S. civilian citizen rests with the Secretary of State—not with the Secretary of Defense, and not with any member of the armed forces. 18 U.S.C. §§ 3186, 3196. To be sure, *amici* assume that if the Secretary of State objected to the proposed transfer, she would say so. But that is not the way extradition is supposed to work. The decision to extradite must be made by the Department of State—not made by the Department of Defense usurping the Department of State's authority.

1. The Request for Extradition

Iraq, as the requesting state, must formally request extradition pursuant to the Extradition Treaty. 18 U.S.C. § 3183. The request is made to the Department of State, which determines whether the request is within the relevant treaty, and if so, forwards the request to the Department of Justice for a similar screening. Once this is complete, the request is forwarded to the U.S. Attorney for the judicial district with jurisdiction. *Restatement (Third) of Foreign Relations* § 478 (1987).

The complaint must set forth the identity of the individual, the treaty in force, that an extraditable offense under the treaty was committed,[17] and the existence of probable cause supported by an accompanying charging instrument (or judgment of conviction). Bassiouni, INT'L EXTRADITION at 823-24. The complaint must also be accompanied by a sworn statement of the appropriate person with authority of the requesting country and all supporting evidence. *Id.*

2. The "Probable Cause" Hearing

The heart of the procedural safeguards afforded by the Extradition Act is the provision for a judicial hearing to determine "whether probable cause

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[17] Not all offenses are extraditable. The U.S.-Iraq Extradition Treaty lists 24 offenses that qualify for extradition "if they are punishable by the laws of both countries." U.S.-Iraq Extradition Treaty, Art. II, 49 Stat. 3380, TS 907 (June 7, 1934).

supports the charges." 18 U.S.C. § 3184; *Collins v. Loisel*, 259 U.S. 309, 316 (1922) ("whether there is competent evidence to justify holding the accused to await trial.").

Upon a finding of probable cause, the judicial officer "shall" certify the extraditability of the individual. 18 U.S.C § 3184. Such a finding is not a final decision under 28 U.S.C § 1291 and thus, it is not appealable.

3. Habeas Corpus in Extradition Proceedings

The subject of an extradition hearing may challenge the decision by habeas petition to test whether the offense charged is within the treaty, whether there is probable cause, and whether extradition should be denied based on defenses provided by the treaty or the Constitution. Bassiouni, INT'L EXTRADITION at 911-912. *In re Burt*, 737 F.2d 1477, 1482-85 (7th Cir. 1984) ("treaty obligations cannot justify otherwise unconstitutional governmental conduct") *quoting Plaster v. United States*, 720 F.2d 348, 349 (4th Cir. 1983); *Mironescu v. Costner*, 480 F.3d 664, 665 (4th Cir. 2007); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th Cir. 2000), *citing Collins v. Miller*, 252 U.S. 364, 369-70 (1920).

4. The Discretion of the Department of State Not to Extradite

Even if there is a basis to extradite grounded in treaty and statute, and even if an extradition

hearing holds that there is probable cause, the Department of State has discretion not to extradite. 18 U.S.C. §§ 3186, 3196; *U.S. v. Balsys*, 524 U.S. 666, 719 (1998). This discretion may be exercised based on any grounds, including humanitarian or political grounds. *Mironescu*, at 666 (4th Cir. 2007), citing *United States v. Kin-Hong*, 110 F.3d 103, 109-10 (1st Cir. 1997); Bassiouni, INT'L EXTRADITION at 945.

Indeed, the Federal Parties are wrong when they claim the U.S. has no obligation to consider whether Messrs. Omar and Munaf would be tortured upon the transfer of their custody to Iraqi authorities. (Fed. Parties Br. at 47.) The Secretary of State has the obligation to determine whether a person subject to extradition would be tortured. In fact, under the Foreign Affairs Reform and Restructuring Act of 1998, ("FARR"), P.L 105-277 § 1301, codified at 8 U.S.C. §§ 1101 *et seq.*, implementing the United Nations Convention Against Torture,[18] the Department of State cannot extradite a person if "there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231(a).[19]

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[18] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess. 93 Plen. Mtg., at 395, U.N. Doc. A/64, at 63 (1984).

[19] There is a split in authority as to whether the Secretary of State's decision is reviewable under the Administrative (cont'd)

Among the *amici*, as professors of international law, there may be varying views as to whether it would be desirable to modify these procedures, by statute, in some respects. But the *amici* are united in their view that to simply cast these procedures aside, as the Federal Parties propose to do, undermines the rule of law, which is the foundation for the role that the U.S. plays in foreign affairs and "the cornerstone of a free and democratic society."

CONCLUSION

Holding that the law of extradition applies would not, in any way, dictate the outcome of the extradition hearing—an issue that is not ripe for this Court to address, and which the *amici* do not address. It is possible an extradition hearing could result in the transfer of Messrs. Omar and Munaf to Iraqi custody; it is also possible that extradition would be denied. All that *amici* ask, at this stage of the proceedings, is that this Court not permit the Federal Parties to turn back the law of extradition to the days of *Robins* (when the judiciary could not ensure that U.S. citizens subject to extradition would be afforded their due process rights), by transferring two U.S. citizens from the custody of the U.S. to the custody of Iraq without following the requirements of the applicable treaties and statutes.

(cont'd)
Procedure Act. 22 C.F.R. § 95.4 (2001); 5 U.S.C. § 704 (2000); Bassiouni, INT'L EXTRADITION at 796.

Because extradition is the exclusive process by which the U.S. may transfer Messrs. Omar and Munaf to the State of Iraq for Iraqi criminal proceedings, this Court should affirm the judgment in No. 07-394 and reverse the judgment in No. 06-1666.

Dated: February 26, 2008

Respectfully submitted,

Richard M. Zuckerman
SONNENSCHEIN NATH & ROSENTHAL LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 398-5213
Counsel of Record for Amici Curiae

Paula M. Yost
Matt Marostica
Hillary Noll Kalay
Eva López-Paredes
Of Counsel

APPENDIX

APPENDIX A

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LIST OF *AMICI*

The following *amici* join in this brief.

William J. Aceves, Associate Dean for Academic Affairs and Professor of Law, California Western School of Law, San Diego, California.

M. Cherif Bassiouni, Distinguished Research Professor of Law, DePaul University College of Law, Chicago, Illinois; President, the International Human Rights Law Institute. Additional biographical information appears below.

Christopher L. Blakesley, Cobeaga Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas, Las Vegas, Nevada.

Bartram S. Brown, Professor of Law, Co-Director, Int'l and Comparative Law Program, Chicago-Kent College of Law, Illinois Institute of Technology, Chicago, Illinois.

Roger S. Clark, Board of Governors Professor, Rutgers University School of Law, Camden, New Jersey.

Nancy Combs, Associate Professor of Law, William & Mary School of Law, Williamsburg, Virginia.

David M. Crane, Former Founding Chief Prosecutor, Special Court for Sierra Leona;

Professor, Syracuse University School of Law, Syracuse, New York.

Daniel H. Derby, Professor and Director of International Programs, Touro College Jacob D. Fuchsberg Law Center, Central Islip, New York.

Mark A. Drumbl, Class of 1975 Alumni Professor, Director, Transnational Law Institute, Washington & Lee University, School of Law, Lexington, Virginia.

Valerie Epps, Professor of Law and Director of the International Law Concentration, Suffolk University Law School, Boston, Massachusetts.

Richard A. Falk, Albert G. Milbank Professor of International Law and Practice, Emeritus, Princeton University, Princeton New Jersey; Visiting Distinguished Professor, Global Studies, University of California - Santa Barbara.

Stephen H. Legomsky, Washington University School of Law, St. Louis, Missouri.

Bert Lockwood, Distinguished Service Professor, Director, Urban Morgan Institute for Human Rights, University of Cincinnati College of Law, Cincinnati, Ohio; Editor-in Chief, Human Rights Quarterly, Johns Hopkins University Press, 1982- ; Series Editor, Pennsylvania Studies in Human Rights, University of Pennsylvania Press, 1988-.

Linda A. Malone, Marshall-Wythe Foundation Professor of Law, Director, Human Rights and National Security Law Program, William and Mary Law School, Williamsburg, Virginia.

Stephen C. McCaffrey, Distinguished Professor and Scholar, University of the Pacific, McGeorge School of Law, Sacramento, California.

James A.R. Nafziger, Thomas B. Stoel Professor of Law, Willamette University College of Law, Salem, Oregon.

Ved Nanda, Vice Provost, Evans University Professor, Marsh Professor of Law Director, International Legal Studies Program, University of Denver, Sturm College of Law, Denver, Colorado.

Jordan J. Paust, Mike and Teresa Baker Law Center Professor, University of Houston Law Center, Houston, Texas.

John Quigley, President's Club Professor in Law, The Ohio State University, Columbus, Ohio.

Naomi Roht-Arriaza, Professor of Law, University of California, Hastings College of the Law, San Francisco, California.

Leila Nadya Sadat, Henry H. Oberschelp Professor of Law, Director, Whitney R. Harris World Law Institute, Washington University School of Law, St. Louis, Missouri.

Michael P. Scharf, Professor of Law and Director, Frederick K. Cox International Law Center,

Case Western Reserve University School of Law, Cleveland, Ohio.

Ron Slye, Associate Professor of Law and Director of International & Comparative Law Programs, Seattle University School of Law, Seattle, Washington; Honorary Professor, University of the Witwatersrand School of Law, Johannesburg, South Africa.

Johan D. van der Vyver, I.T. Cohen Professor of International Law and Human Rights, Emory University School of Law, Atlanta, Georgia.

Jon M. Van Dyke, Professor of Law, William S. Richardson School of Law, University of Hawaii at Manoa, Honolulu, Hawaii.

Richard J. Wilson, Professor of Law, Director, International Human Rights Law Clinic, American University, Washington College of Law, Washington, DC.

Jeanne M. Woods, Henry F. Bonura, Jr. Distinguished Professor of Law, Loyola University, New Orleans, Louisiana.

Additional Biographical Information

M. Cherif Bassiouni is also President of the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy, as well as the Honorary President of the International Association of Penal Law (President 1989-2004), based in Paris, France.

Professor Bassiouni has served the United Nations in a number of capacities, including as: Member and then Chairman of the Security Council's Commission to Investigate War Crimes in the Former Yugoslavia (1992-94); Commission on Human Rights' Independent Expert on The Rights to Restitution, Compensation and Rehabilitation for Victims of Grave Violations of Human Rights and Fundamental Freedoms (1998-2000); Vice-Chairman of the General Assembly's Ad Hoc Committee on the Establishment of an International Criminal Court (1995); and Chairman of the Drafting Committee of the 1998 Diplomatic Conference on the Establishment of an International Criminal Court. In 2004, he was appointed by the United Nations High Commissioner for Human Rights as the Independent Expert on the Situation of Human Rights in Afghanistan.

In 1999, Professor Bassiouni was nominated for the Nobel Peace Prize for his work in the field of international criminal justice and for his contribution to the creation of the International Criminal Court. He has received the following medals: Grand Cross of the Order of Merit (Commander), Federal Republic of Germany (2003); Legion d'Honneur (Officier), Republic of France (2003); Order of Lincoln of Illinois, United States of America (2001); Grand Cross of the Order of Merit, Republic of Austria (1990); Order of Sciences (First Class), Arab Republic of Egypt (1984); Order of Merit (Grand'Ufficiale), Republic of Italy (1977), and Order of Military Valor (First Class), Arab Republic of Egypt (1956). He has also received numerous academic and civic awards, including the Special

Award of the Council of Europe (1990); the Defender of Democracy Award, Parliamentarians for Global Action (1998) The Adlai Stevenson Award of the United Nations Association (1993); and the Saint Vincent DePaul Humanitarian Award (2000).

Professor Bassiouni is the author of 27 and editor of 44 books, and the author of 217 articles on a wide range of legal issues, including international criminal law, comparative criminal law, and international human rights law. His publications have appeared in Arabic, Chinese, Farsi, French, Georgian, German, Hungarian, Italian, and Spanish. Some of these publications have been cited by the International Court of Justice, the International Criminal Tribunal for the Former Yugoslavia (ICTY), The International Criminal Tribunal for Rwanda (ICTR), this Court, several U.S. Courts of Appeals and District Courts, and several State Supreme Courts.

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Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., *Petitioners*,
v.
SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR, *Respondents*.

MOHAMMAD MUNAF, ET AL., *Petitioners*,
v.
PETE GEREN, SECRETARY OF THE ARMY, ET AL., *Respondents*.

On Writ of Certiorari to the
United States Court of Appeals for the
District of Columbia Circuit

BRIEF AMICI CURIAE OF THE CONSTITUTION PROJECT AND THE RUTHERFORD INSTITUTE IN SUPPORT OF THE HABEAS PETITIONERS

SHARON BRADFORD FRANKLIN
THE CONSTITUTION PROJECT
1025 Vermont Avenue, N.W.
Third Floor
Washington, D.C. 20005
(202) 580-6920

CHRISTOPHER T. HANDMAN*
PAUL A. WERNER
MICHAEL SEVI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

*Counsel of Record

Counsel for Amici Curiae

(additional counsel listed on inside cover)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Additional Counsel:

JOHN W. WHITEHEAD
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906
(434) 978-3888

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT OF INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
I. UNITED STATES COURTS HAVE JURISDICTION TO REVIEW HABEAS CLAIMS BY AMERICAN CITIZENS HELD "IN THE CUSTODY" OF AMERICAN OFFICIALS PARTICIPATING IN THE MULTINATIONAL FORCE AT ISSUE HERE	7
A. American Citizens Enjoy A Historic And Fundamental Liberty Interest In Freedom From Arbitrary Detention By Their Own Government That Is Protected By The Writ Of Habeas Corpus.	7
B. That An American Citizen Is Held In American Custody As A Result Of American-Led Multinational Military Operations Does Not Deprive A Court Of Jurisdiction Over A Writ Of Habeas Corpus	11
C. *Hirota* v. *MacArthur* Does Not Control The Question Presented	19
D. The Government's Proposed Rule Of Decision Conflicts With This Court's Decisions	22

TABLE OF CONTENTS—Continued

Page

E. The Government's Rule Would Create Perverse Incentives To Detain American Citizens Under The Auspices Of Multinational Military Operations As A Way To Circumvent Judicial Review 24

F. The Government Is Wrong That The Separation-Of-Powers Doctrine Supports The Rule That It Draws From *Hirota* 26

CONCLUSION 31

TABLE OF AUTHORITIES

Page

CASES:

Abu Ali v. *Ashcroft*, 350 F. Supp. 2d 28 (D.D.C. 2004) 11, 25, 26

Braden v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973) 13

Cohens v. *Virginia*, 19 U.S. (6 Wheat) 264 (1821) 10

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 10

Ex parte Endo, 323 U.S. 283 (1944) 13

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 27

Ex parte Yerger, 75 U.S. (8 Wall.) 85 (1868) 9

Foucha v. *Louisiana*, 504 U.S. 71 (1992) 8

Frank v. *Mangum*, 237 U.S. 309 (1915) 12

Hamdan v. *Rumsfeld*, 126 S. Ct. 2749 (2006) 3, 28, 29

Hamdi v. *Rumsfeld*, 542 U.S. 507 (2004) ..... *passim*

Harris v. *Nelson*, 394 U.S. 286 (1969) 9, 11, 12

Hensley v. *Municipal Court, San Jose Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345 (1973) 12, 13

TABLE OF AUTHORITIES—Continued

Page

Hirota v. *MacArthur*, 338 U.S. 197 (1948) ..... *passim*

INS v. *St. Cyr*, 533 U.S. 289 (2001) 27

Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 22, 24

Jones v. *Cunningham*, 371 U.S. 236 (1963) 12, 13

Justices of Boston Mun. Court v. *Lydon*, 466 U.S. 294 (1984) 12

Lonchar v. *Thomas*, 517 U.S. 314 (1996) 10

Madsen v. *Kinsella*, 343 U.S. 341 (1952) 15, 16, 17

Maleng v. *Cook*, 490 U.S. 488 (1989) 12

Mistretta v. *United States*, 488 U.S. 361 (1989) 28

Munaf v. *Geren*, 482 F.3d 582 (D.C. Cir. 2007) ..... *passim*

Omar v. *Harvey*, 479 F.3d 1 (D.C. Cir. 2007) 11, 19, 20, 21

Peyton v. *Rowe*, 391 U.S. 54 (1968) 9, 13

Preiser v. *Rodriguez*, 411 U.S. 475 (1973) 10

Rasul v. *Bush*, 542 U.S. 466 (2004) ..... *passim*

Rumsfeld v. *Padilla*, 542 U.S. 426 (2004) 3, 13, 14

TABLE OF AUTHORITIES—Continued

Page

United States ex rel. Toth v. *Quarles*, 350 U.S. 11 (1955) 16, 17

United States v. *Montalvo-Murillo*, 495 U.S. 711 (1990) 29

United States v. *Robel*, 389 U.S. 258 (1967) 4

Wales v. *Whitney*, 114 U.S. 564 (1885) 13

Williams v. *Kaiser*, 323 U.S. 471 (1945) 9

CONSTITUTION:

U.S. Const. art. I, § 9, cl. 2 10

U.S. Const. art. II 7, 26

U.S. Const. art. III 7, 26

STATUTES:

28 U.S.C. § 2241(c) 11

28 U.S.C. § 2243 13

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82 10

LEGISLATIVE MATERIALS:

Nomination of General George W. Casey, Jr., for Reappointment to the Grade of General & To Be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Serv., 108th Cong. (June

TABLE OF AUTHORITIES—Continued

Page

24, 2004) (statement of Gen. George W. Casey, Jr.) 14

RULES:

S. Ct. Rule 37.3(a) 1

S. Ct. Rule 37.6 1

INTERNATIONAL RESOLUTIONS:

S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950) 17

S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950) 17

OTHER AUTHORITIES:

William Blackstone, *Commentaries on the Laws of England* (1765) 8, 9, 11

Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq, at 3 (2004) 14

Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* (2005) 2

Constitution Project, *Statement on Restoring* Habeas Corpus *Rights Eliminated by the Military Commissions Act* (2007) 2

Markus Eder, *Crime and Punishment in the Royal Navy of the Seven Years' War* (Ashgate 2004) 19

TABLE OF AUTHORITIES—Continued

Page

The Federalist No. 45 ..... 8, 27

The Federalist No. 47 29

The Federalist No. 84 ..... 8, 27

W. Friedman, *The Allied Military Government of Germany* (1947) 16

Elmer Plischke, *History of the Allied High Commission for Germany: Its Establishment, Structure and Procedures* (1951) 16

STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are two not-for-profit, public-interest organizations that share an interest in preserving the historic right of American citizens held in American custody to invoke the Great Writ of habeas corpus. Both groups work to safeguard constitutional rights, and seek to preserve the fundamental point of law that an American citizen cannot be denied habeas corpus simply because he is delivered into American custody by a multinational military force led by the United States.[1]

Amicus the Constitution Project ("the Project") is a bipartisan organization that promotes and defends constitutional safeguards. The Project brings together legal and policy experts from across the political spectrum to promote consensus solutions to pressing constitutional issues. After September 11, 2001, the Project created its Liberty and Security Committee, a blue-ribbon committee of prominent Americans, to address the importance of preserving civil liberties as we work to protect our Nation from international terrorism. The committee develops policy recommendations on such issues as the use of military commissions and governmental surveillance policies, and emphasizes the need for all three branches of government to play a role in preserving constitutional rights.

Additionally, the Project's War Powers Committee released a report in June 2005 entitled *Deciding to*

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[1] Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

Use Force Abroad: War Powers in a System of Checks and Balances,[2] analyzing the respective powers of all three branches of government during wartime. The Project's Courts Committee also conducts public education on the importance of an independent Judiciary and cautions against legislation or Executive Branch practices that would limit the jurisdiction of federal courts.

In March 2007, the Project issued a *Statement on Restoring* Habeas Corpus *Rights Eliminated by the Military Commissions Act*, signed by a bipartisan group of approximately 40 political leaders, policy experts, and legal scholars. The signatories to the statement reaffirmed that the Great Writ serves as the preeminent safeguard of individual liberty and separation of powers by supplying "the critical, fail-safe procedure to ensure that the executive has complied with the Constitution and laws of the United States."[3]

Amicus the **Rutherford Institute** ("the Institute") is an international civil-liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated. The Institute also strives to educate the public about constitutional and human-rights issues. During its 25-year history, attorneys affiliated with the Institute have represented numerous parties before the U.S. Supreme Court. The Institute has also filed briefs *amicus*

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[2] The Project's report is available online at http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad.pdf.

[3] The Project's Statement and the attendant list of signatories is available at http://www.constitutionproject.org/pdf/MCA_Statement.pdf.

curiae with this Court in cases dealing with critical constitutional issues arising from the current efforts to combat terrorism. *See Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749 (2006); *Rasul* v. *Bush*, 542 U.S. 466 (2004); *Rumsfeld* v. *Padilla*, 542 U.S. 426 (2004).

Owing to their belief in the importance of the fundamental right of habeas corpus enjoyed by all American citizens, the *amici* thus have a keen interest in the principle of law that this Court announces in resolving these cases. That is because the novel and sweeping rule that the Government advances here threatens to undermine the historic right of American citizens to challenge in federal court the lawfulness of their detention by their own government. If left unchecked, the Executive's proclaimed detention power would authorize the Government to detain indefinitely—and unlawfully—American citizens held in American custody, so long as the Government dressed up that detention with a multinational-forces fig leaf. But this Court has rejected such formalisms in the past; it should do so again here. The liberty promised in the Constitution—and protected by the Great Writ—should not turn on such preciously fine (and practically meaningless) distinctions.

SUMMARY OF ARGUMENT

Our Nation's abiding commitment to individual liberty is tested during grave times like these, when our military is engaged in multiple wars abroad against stateless enemies trying to inflict harm at home. But while military and political priorities inevitably shift and adapt to these challenges, the Constitution's commitment to liberty remains constant. That consistency ensures that we "preserve our commitment at home to the principles for which we fight abroad." *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 532 (2004) (plurality op.). For "[i]t would indeed be ironic if, in the name of national defense, we would

sanction the subversion of one of those liberties * * * which makes the defense of the Nation worthwhile." *United States* v. *Robel*, 389 U.S. 258, 264 (1967).

But as our military fights international terrorism overseas in Iraq to defend our freedoms, at home the Government asserts that the federal courts are without jurisdiction to entertain writs of habeas corpus filed by American citizens who have been detained abroad during that military effort. The reason: These citizens' custodian—a Lieutenant Colonel in the U.S. Army, answerable exclusively to a U.S. chain of command—is formally part of a U.S.-led (and dominated) multinational force authorized by the United Nations.

Thus, in these two cases, the Government threatens to unlawfully and indefinitely confine two American citizens, Shawqi Omar and Mohammed Munaf (the "habeas petitioners"), without affording them access to the basic procedural safeguard that the Framers fashioned to challenge government detention: the Great Writ of habeas corpus. This move cuts deeply against tradition. Both the right at stake and the attendant procedural remedy for its violation have ancient roots extending into our English common-law heritage, are expressly protected in our Constitution, and have been jealously guarded by courts—including this one—for centuries.

Given the United States' ever increasing involvement in international agreements, multinational military efforts, and security compacts, the jurisdictional rule championed by the Government would radically limit federal courts' habeas jurisdiction. This Court should not embrace such a boundless and easily manipulated rule. Instead, it should adopt a firm and easy-to-apply rule that puts to practice this Court's precedents and the Great Writ's heritage: American citizens are entitled to challenge their detention in federal court whenever they are held in

the custody of American officials who, as here, are answerable to a U.S. chain of command—regardless of whether those U.S. officials are participating in multinational military operations.

This rule reflects the historically expansive interpretation that this Court has afforded the habeas statute's "in custody" requirement. For example, this Court has emphasized that a petitioner is "in custody" whenever the custodian is a government official capable of producing the petitioner before the habeas court. Under this easily administered rubric, Omar and Munaf are held in the custody of U.S. authorities capable of producing them before the habeas courts. Notwithstanding their participation in multinational military operations in Iraq, our military forces holding Omar and Munaf there answer exclusively to an American—not multinational—chain of command.

This Court has indeed assumed jurisdiction over habeas petitions in the past that stemmed from American participation in multinational military efforts, including World War II, the Korean War, and the ongoing efforts to combat international terrorism. Most notably, in *Hamdi* this Court addressed the merits of a habeas petition filed by another American citizen who landed in American custody as a result of U.S. participation in multinational military operations. Not one Justice concluded, or even hinted, that federal courts might be deprived of jurisdiction over Hamdi's habeas petition simply because he was captured and initially detained in Afghanistan by military forces participating in Operation Enduring Freedom, a coalition of forces from the United States, the United Kingdom, and the Northern Alliance. That distinction did not matter in *Hamdi*; it should not matter here.

In support of its multinational-force limitation on federal courts' habeas jurisdiction, the Government

invokes one—and only one—case: *Hirota* v. *MacArthur*, 338 U.S. 197 (1948). But that terse per curiam opinion—nine sentences in all—does not support the expansive jurisdictional limitation the Government claims. Rather, the case was narrowly decided on the specific circumstances involved there, including circumstances not present here: Unlike the habeas petitioners in these cases, the petitioners in *Hirota* were foreign citizens who improperly invoked this Court's appellate jurisdiction to launch a collateral attack on their military-tribunal convictions.

But the Government's proposed jurisdictional limitation is not only unsupported by the one case that it cites in support of it. The limitation also conflicts with this Court's longstanding recognition that American citizens held in American custody may, by virtue of their citizenship, challenge the lawfulness of their detention by petitioning federal courts for release. The Court most recently reaffirmed this rule in *Hamdi*, which, just like these cases, involved the Executive's detention of an American citizen by American authorities as a result of U.S. participation in multinational military operations.

The multinational-force limitation on federal courts' habeas jurisdiction that the Government advances would also create perverse incentives for the Executive to detain American citizens under the auspices of an international arrangement to obtain the unbridled discretion to determine whether to recognize their constitutional rights *vel non*. That discretion would also allow the Government to escape this Court's core holding in *Hamdi*: The Executive would be under no obligation to provide enemy combatants any measure of due process if it could entirely escape federal court jurisdiction simply by claiming its challenged actions were taken in accordance with some multinational arrangement.

Nor do separation-of-powers principles support the jurisdictional limitation that the Government claims is mandated by *Hirota*. Just the opposite. The Government's rule would consolidate within the Executive Branch power that is constitutionally vested in the Judicial Branch. It would let the Executive—exercising its Article II powers—detain U.S. citizens abroad but then insulate that decision from Article III review by unilaterally opting to participate in a multinational military operation. But a U.N. Resolution or armed-forces agreement cannot—any more than an act of Congress—provide a "blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536 (plurality opinion).

ARGUMENT

I. UNITED STATES COURTS HAVE JURISDICTION TO REVIEW HABEAS CLAIMS BY AMERICAN CITIZENS HELD "IN THE CUSTODY" OF AMERICAN OFFICIALS PARTICIPATING IN THE MULTINATIONAL FORCE AT ISSUE HERE.

A. American Citizens Enjoy A Historic And Fundamental Liberty Interest In Freedom From Arbitrary Detention By Their Own Government That Is Protected By The Writ Of Habeas Corpus.

The Government's asserted multinational-force limitation on federal courts' habeas jurisdiction threatens to deprive the habeas petitioners here of their fundamental right to be free from arbitrary and indefinite Executive detention that was recognized in England centuries ago, is part of our common law heritage, is embedded in our Constitution, and has been repeatedly reaffirmed in this Court's jurisprudence.

1. Since ancient times, the Great Writ has played an essential role in a free society by protecting the individual's vital liberty interest in being free from arbitrary and unlawful imprisonment by his or her own government. As William Blackstone explained centuries ago, "confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government." 1 W. Blackstone, *Commentaries on the Laws of England* 132 (1765) [hereinafter Blackstone]. The Founders of this Nation knew the danger of which Blackstone spoke. *See Federalist No. 84* (Hamilton); *see Hamdi*, 542 U.S. at 555 (Scalia, J., dissenting) (noting that Hamilton quoted this "very passage" from Blackstone). Alexander Hamilton, in defending our Constitution, described "the practice of arbitrary imprisonment" as a "favourite and most formidable instrument of tyranny." *Federalist No. 84.*

This Court has also consistently recognized "the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Hamdi*, 542 U.S. at 531; *see also Foucha* v. *Louisiana*, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."). As this Court has only recently explained, "Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man should be imprisoned, dispossessed, outlawed or exiled save by the judgment of his peers or by the law of the land." *Rasul*, 542 U.S. at 474 (quotation marks omitted).

2. The recognition of this fundamental right—being free from unlawful government detention—is no less historic than the recognition of the proper

remedy for a violation of it: The Great Writ of habeas corpus, which has long stood as "the symbol and guardian of individual liberty." *Peyton* v. *Rowe*, 391 U.S. 54, 58 (1968). That writ, as this Court has recognized, "is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." *Harris* v. *Nelson*, 394 U.S. 286, 290-291 (1969). And as the procedural vehicle providing "a swift and imperative remedy in all cases of illegal restraint or confinement," the writ "is of immemorial antiquity." *Williams* v. *Kaiser*, 323 U.S. 471, 484 n.2 (1945) (quotation marks omitted).

The Great Writ traces its origins to our English forbears, who fashioned it to protect individuals from government abuses of power. *See id.* (noting an "instance of its use occurring in the thirty-third year of Edward I"). As this Court has explained, "[t]he judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint." *Rasul*, 542 U.S. at 474. And "after a long struggle" with the Crown, the writ of habeas corpus was "firmly guaranteed [to English subjects] by the famous Habeas Corpus Act of May 27, 1679." *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868). Blackstone described the passage of this Act as "another [M]agna [C]harta," 3 Blackstone 135, tailor-made "for the better securing of the liberty of the subject," *Ex parte Yerger*, 75 U.S. at 95. In time, the habeas writ came to be "the most celebrated writ in the English law," 3 Blackstone 129, and it has yet to lose its allure: For centuries it has been "esteemed the best and only sufficient defence of personal freedom." *Ex parte Yerger*, 75 U.S. at 95.

From our Nation's founding, the writ has been entrenched "deep into the Genius of our common law." *Id.* For "[b]y the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement

* * * was * * * an integral part of our common-law heritage." *Preiser* v. *Rodriguez*, 411 U.S. 475, 485 (1973). That common-law heritage was later honored with a privileged place in our Nation's founding document; it is "the only common law writ to be explicitly mentioned" in the Constitution. *Hamdi*, 542 U.S. at 558 (Scalia, J., dissenting). Thus, the Suspension Clause provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const. art. I, § 9, cl. 2.

Soon after the Constitution was ratified, the federal courts were entrusted with carrying out the Suspension Clause's command. As Chief Justice Marshall has explained, the First Congress, "[a]cting under the immediate influence of this injunction[,]" gave "this great constitutional privilege * * * life and activity." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 95 (1807). The Judiciary Act of 1789, which constitutes "a contemporaneous exposition of the constitution," *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 420 (1821), authorized federal courts to grant the writ of habeas corpus in any case of detention "under or by colour of the authority of the United States." Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82.

From that day forward, the writ of habeas corpus has operated as this Nation's "highest safeguard of liberty." *Lonchar* v. *Thomas*, 517 U.S. 314, 322 (1996) (quotation marks omitted). Accordingly, "this Court has recognized the federal courts' power to review applications for habeas relief in a wide variety of cases involving executive detention, in wartime as well as in times of peace." *Rasul*, 542 U.S. at 474. And it is no less vital today during the ongoing efforts to combat terrorism than it has been in the past: Even "now, in the twenty-first century, the writ continues to protect fundamental rights as the

United States confronts the challenge of international terrorism." *Omar* v. *Harvey*, 479 F.3d 1, 5 (D.C. Cir. 2007).

B. That An American Citizen Is Held In American Custody As A Result Of American-Led Multinational Military Operations Does Not Deprive A Court Of Jurisdiction Over A Writ Of Habeas Corpus.

"The turnkey of the habeas statute is the requirement of custody." *Abu Ali* v. *Ashcroft*, 350 F. Supp. 2d 28, 45 (D.D.C. 2004).[4] It has long been the rule that this critical "in custody" requirement is satisfied whenever a person is held by an American official, provided that the official has the ability to produce the person before the habeas court. That is indisputably the case here. And this Court's decisions since World War II make clear that the fact that the habeas petitioners in these cases came into American custody as a result of multinational military operations does not alter that calculus.

1. From its inception, courts have given the Great Writ of habeas corpus a broad reach. *See* 3 Blackstone 131 ("[T]he great and efficacious writ in *all manner* of illegal confinement, is that of habeas corpus.") (emphasis added). This practice is true to the writ's high office: "The very nature of the writ demands that it be administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." *Harris*, 394 U.S. at 291. As Justice Holmes explained, "habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in

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[4] *See* 28 U.S.C. § 2241(c) ("The writ of habeas corpus shall not extend to a prisoner unless * * * [h]e is in custody under or by color of the authority of the United States * * * or * * * [h]e is in custody in violation of the Constitution or laws or treaties of the United States").

from the outside * * * and although every form may have been preserved, opens the inquiry whether they have been more than an empty shell." *Frank* v. *Mangum*, 237 U.S. 309, 346 (1915) (Holmes, J., dissenting); *see also Harris*, 394 U.S. at 291 ("The scope and flexibility of the writ—its capacity to reach all manner of illegal detention—its ability to cut through barriers of form and procedural mazes—have always been emphasized and jealously guarded by courts and lawmakers.").

Accordingly, federal courts have given the habeas statute's "in custody" requirement a broad construction. *See, e.g.*, *Maleng* v. *Cook*, 490 U.S. 488, 492 (1989) ("[W]e have very liberally construed the 'in custody' requirement for purposes of federal habeas."). As this Court has emphasized, "we have consistently rejected interpretations of the habeas corpus statute that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacles of arcane and scholastic procedural requirements." *Hensley* v. *Municipal Court, San Jose Milpitas Judicial Dist., Santa Clara County*, 411 U.S. 345, 350 (1973).

Consistent with a flexible approach designed to serve the core purpose of the habeas statute—to free citizens unlawfully imprisoned by their government—this Court over the years has indeed steadily expanded the scope of the statute's "in custody" requirement. *See Hensley*, 411 U.S. at 351 ("The custody requirement of the habeas corpus statute is designed to preserve the writ of habeas corpus as a remedy for severe restraints on individual liberties."). As a result, "the use of habeas corpus has not been restricted to situations in which the applicant is in actual, physical custody." *Jones* v. *Cunningham*, 371 U.S. 236, 239 (1963). Thus, this Court has held that a petitioner remained in state custody despite being released "on personal recognizance," *Justices of Boston Mun. Court* v. *Lydon*, 466 U.S. 294, 300

(1984); that a petitioner remained in custody of the Virginia Parole Board despite being paroled, *see Cunningham*, 371 U.S. at 243; and that a petitioner imprisoned in Alabama nevertheless remained in Kentucky's custody, *see Braden* v. *30th Judicial Circuit Court of Ky.*, 410 U.S. 484 (1973).

Underlying this robust expansion of the habeas statute's "in custody" requirement is the basic principle that a person is "in custody" whenever the custodian is a government official with the ability to produce the person before the habeas court. *See* 28 U.S.C. § 2243 ("The writ * * * shall be directed to the person having custody of the person detained."); *Peyton*, 391 U.S. at 58 (explaining the habeas writ "assures * * * that a prisoner may require his jailer to justify the detention under the law."). As this Court explained before the turn of the last century, the habeas statute "contemplate[s] a proceeding against some person who has the immediate custody of the person detained, *with the power to produce the body of such person before the court or judge*, that he may be liberated if no sufficient reason is shown to the contrary." *Wales* v. *Whitney*, 114 U.S. 564, 574 (1885) (emphasis added); *see also Ex parte Endo*, 323 U.S. 283, 306 (1944) ("The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer.") (quotation marks omitted). Nearly a century later, the Court again held that "[t]he writ of habeas corpus does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Braden*, 410 U.S. at 494-495. And just a few years ago, this Court reiterated that the statutory custodian is " 'the person' *with the ability to produce the prisoner's body before the habeas court.*" *Rumsfeld* v. *Padilla*, 542 U.S. 426, 435 (2004) (emphasis added) (quoting 28 U.S.C. § 2243). Thus, the ultimate touchstone of the habeas statute's "in

custody" requirement is the ability of the designated official to produce the petitioner before the habeas court.

2. Under this straightforward test, the habeas petitioners here are plainly held in the custody of American officials with the power to produce them before the habeas courts. After all, it is undisputed that the petitioners are being held at detention facilities run by United States forces operating in Iraq as part of Multi-National Force Iraq—a.k.a., MNF-I. *See* Gov. Br. 5 ("Since his capture, Omar has remained in the custody of members of the United States armed forces operating as part of the MNF-I."); *see also Munaf* v. *Geren*, 482 F.3d 582, 491 (D.C. Cir. 2007) (Munaf is "being held, in Iraq, by United States military personnel serving as part of [MNF-I]"). And the MNF-I "operates under the unified command of United States military officers." Gov. Br. at 2 (quotation marks omitted).

Even while American military personnel participate in MNF-I, they answer only to a United States chain of command ultimately running to the Commander-in-Chief. *See Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force-Iraq*, at 3 (2004). Thus, the United States military personnel detaining the petitioners in Iraq answer to no authority other than United States military personnel and civilian officials. *See Nomination of General George W. Casey, Jr., for Reappointment to the Grade of General & to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Serv.*, 108th Cong. (June 24, 2004) (statement of Gen. George W. Casey, Jr.).

This Court's cases make clear that American citizens so held may petition federal courts for release; that they were placed in American custody by an American-led multinational military force makes no

difference. The Government's claim that federal courts lack jurisdiction in such circumstances would indeed mire them in the very statutory formalism that they have long eschewed.

3. In keeping with the expansive reading of the habeas statute's "in custody" requirement courts historically have not hesitated to assume jurisdiction over writs of habeas corpus imbued with a multinational character like those at issue in these cases. Three of this Court's decisions in particular gainsay the Government's assertion that federal courts are bereft of jurisdiction to entertain writs of habeas corpus involving multinational military operations. These decisions date back to the middle of the last century and involve this Nation's participation in seminal multinational conflicts—World War II, the Korean War, and the ongoing operations to combat terrorism.

First, in *Madsen* v. *Kinsella*, 343 U.S. 341 (1952), this Court exercised jurisdiction over a writ of habeas corpus filed by an American woman who had been convicted under the German Criminal Code by the "United States Court of the Allied High Commission" of murdering her husband, an Air Force lieutenant, during the U.S.-led occupation of Germany following World War II. *Id.* at 343. That court represented a hybrid of U.S. and multinational authority. On the one hand, it was chartered under a law issued by the "Allied High Commission" in 1949, *id.* at 344-345 & n.3, and, as an occupation court, was "designed especially to meet the needs of law enforcement in that occupied territory" and applied "the German Criminal Code largely as it was theretofore in force." *Id.* at 355-356.

But on the other hand, its existence was rooted to an international framework established by the four Allied powers. Following the German surrender in May 1945, the Allied powers asserted supreme

authority over Germany and agreed that "authority was to be wielded unilaterally by the Commanders-in-Chief in their respective zones of occupation." Elmer Plischke, *History of the Allied High Commission for Germany: Its Establishment, Structure and Procedures* 1 (1951). And it was under this multinational delegation of authority that General Eisenhower issued Ordinance No. 2 establishing military-occupation courts. *See* W. Friedman, *The Allied Military Government of Germany* 300-303 (1947).

Despite the multinational dimension to *Madsen*, this Court did not dismiss the petition for want of jurisdiction. To the contrary, the Court resolved the case on the merits: It held that "the jurisdiction of the United States Courts of the Allied High Commission for Germany to try petitioner being established, the judgment of the Court of Appeals affirming the discharge of the writ of habeas corpus for petitioner's release from custody is affirmed." *Madsen*, 343 U.S. at 362.

Second, in *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1955), this Court again entertained a writ of habeas corpus arising from American participation in a multinational military effort. The petition at issue was filed on behalf of an American citizen—Toth—detained in Korea for crimes committed during American military operations there. *See id.* at 13. After being discharged from the Air Force, Toth was arrested in Pittsburgh and transported back to Korea to be tried for murder and conspiracy to commit murder before a court-martial. *Id.* at 13 & n.3. His petition challenged the constitutionality of the Government's effort to subject him to a court-martial after being discharged from military service.

Again, the Court did not dismiss Toth's petition for lack of jurisdiction; it decided his case on the merits. *See id.* at 23. Granting Toth's writ, the Court held that "Congress cannot subject civilians like Toth to

trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution." *Id.*

As was the case in *Madsen*, however, the United States' participation in the Korean War was under the auspices of international authority and as a member of a multinational military force. Indeed, much like the present conflict, the United Nations had passed resolutions authorizing multinational military operations there. [5]

Third, and most recently, in *Hamdi* this Court assumed jurisdiction over a writ of habeas corpus involving circumstances very similar to those underlying the petitions involved in these cases. Yasir Hamdi—an American citizen—was captured and detained in Afghanistan as part of Operation Enduring Freedom, a multinational military effort undertaken by the United States, the United Kingdom, and the Northern Alliance. For all intents and purposes, that multinational force operated no differently from the multinational force in Iraq that captured and detained the petitioners in these cases—both of whom are also American citizens. *See* 542 U.S. at 510 (explaining that Hamdi was "seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government," not American forces).

Once again, the fact that Hamdi was captured during a multinational military operation did not operate as a jurisdictional bar to the Court's consideration of his writ of habeas corpus. The Court addressed the merits of Hamdi's petition, holding that enemy combatants are entitled to a "meaningful opportunity to contest the factual basis for [their]

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[5] *See* S.C. Res. 84, U.N. Doc. S/RES/84 (July 7, 1950); S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

detention before a neutral decisionmaker." *Id.* at 509 (plurality op.). While the Court was divided over the resolution of the merits of Hamdi's petition, not a single Justice doubted that the Court had jurisdiction to entertain it in the first place. *See id.* at 539 (plurality op.); *see id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 554 (Scalia, J., dissenting); *id.* at 585 (Thomas, J., dissenting).

Instead of casting doubt on the right of an American citizen held in American custody by virtue of multinational military operations to petition a federal court for a writ of habeas corpus, the plurality "reaffirm[ed] * * * the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Id.* at 531. As the plurality explained, "the interest in being free from physical detention by one's own government * * * is the most elemental of liberty interests." *Id.* at 529. The plurality also made clear that availability of this right did not turn on where Hamdi was held, be it Afghanistan, Cuba, or the United States. *Id.* at 524 (explaining that "it is not at all clear why that should make a * * * difference").

These three cases—*Madsen*, *Toth*, and *Hamdi*—confirm that this Court has never endorsed Executive attempts to limit the Judiciary's habeas jurisdiction based on American participation in multinational military efforts. They also demonstrate that this Court has continually accepted jurisdiction over writs of habeas corpus arising out of this Nation's participation in multinational military operations.[6]

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[6] These cases are consistent with historic practice. During the Seven Years' War, for example, the King's Bench entertained, and ultimately granted, a writ of habeas corpus filed on behalf of Robert Brownless, the master of a Greenland Fishery

For if there were any such limitation, each of these cases could have—and would have—been dismissed for lack of jurisdiction.

The Government nevertheless finds such a limitation in an obscure per curiam decision that this Court itself has apparently never before seen fit to rely upon for any substantive proposition of law. *See Omar*, 479 F.3d at 7. The case does not remotely support the Government's asserted limitation.

C. *Hirota* v. *MacArthur* Does Not Control The Question Presented.

The Government relies upon a single case to support the novel proposition that federal courts lack jurisdiction to entertain writs of habeas corpus filed by American citizens delivered into American custody by a multinational military force led by the United States: *Hirota*. *See, e.g.*, Gov. Br. 21 ("The basic teaching of *Hirota* calls for dismissal of these cases."). But this Court's brief three-paragraph, per curiam opinion in *Hirota* simply cannot bear the weight that the Government invites this Court to place on it: *Hirota* announces *no* rule of general applicability, let alone the surprising and dangerous proposition that the Government says it does.

Hirota's holding is encapsulated in a single sentence: "*Under the foregoing circumstances* the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgment and sentences imposed on these petitioners and *for this reason* the motion for leave to file petitions for writs of habeas corpus are denied." 338 U.S. at 198

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ship, who had been impressed into service in the Royal Navy. *See* Markus Eder, *Crime and Punishment in the Royal Navy of the Seven Years' War* 29-35 (Ashgate 2004). That conflict, like the present one, had multinational dimensions, with Great Britain joining in a coalition that included Prussia.

(emphasis added). But the Court declined to articulate which of the "circumstances" that it described in the "foregoing" two paragraphs of the opinion it actually found to control the outcome. *See id.* at 197-198.

Yet, whatever the critical "foregoing circumstances" were that motivated the Court's holding, the court's recitation included a particularly notable distinguishing fact not involved here. Unlike the American petitioners involved in these cases, the petitioners in *Hirota* were "all residents and citizens of *Japan*." 338 U.S. at 197 (emphasis added). Moreover, the Court's decision seems to reflect the unique procedural nature of the challenge, which again was quite different from these cases: Before seeking relief in a district court, the *Hirota* petitioners invoked the Court's appellate jurisdiction to collaterally attack the judgments of "[t]he military tribunals * * * set up by General MacArthur as the agent of the Allied Powers." *See id.*

In any event, it is clear that the Court's modest and largely unexplained holding in *Hirota*, which was expressly based on the particular circumstances involved in that case, cannot "establish[ ] that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority." Gov. Br. 17. For there is not "anything in the [*Hirota*] opinion hold[ing] that federal courts lack habeas jurisdiction whenever, as the government insists, American officials detaining a petitioner are functioning as part of a multinational force." *Omar*, 479 F.3d at 7. Far from announcing any such rule, the *Hirota* Court was careful to articulate "*no* general legal principle at all" to ensure that the case would be decided on the "narrowest possible grounds." *Id.* (emphasis added).

Even the *Munaf* court, which ultimately found jurisdiction over Munaf's petition wanting, declined

to "suggest that [it] [found] the logic of *Hirota* especially clear or compelling, particularly as applied to American citizens." *Munaf v. Geren*, 482 F.2d at 584.[7] Rather than embrace the Government's reading of *Hirota*, the court there simply—if incorrectly[8]—concluded that *Hirota* held that "the fact of a criminal conviction in a non-U.S. court is a fact of jurisdictional significance under the habeas statute." *Id.*

In claiming that *Hirota* establishes a categorical ban on habeas jurisdiction whenever an American citizen is held by a multinational force, the Government stretches that modest per curiam decision beyond all recognition. The Government takes a cursory opinion—which was expressly limited to its unique circumstances, resolved without announcing any general rule of decision, and involved no American citizens—and converts it into an expansive warrant for the Executive Branch to detain Americans abroad without any judicial recourse whenever the United States is involved in a multinational conflict. *Hirota* does not support that expansive view of Executive power.

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[7] The third judge of the *Munaf* panel—Judge Randolph—found that the court had jurisdiction to entertain the petition and concurred in the judgment for a different reason. In reaching that conclusion, Judge Randolph actually cited *Hirota* for the proposition that "[t]he critical considerations are that Munaf is an American citizen and that he is held by American forces overseas." *Munaf*, 482 F.2d at 585 (Randolph, J., concurring in the judgment). That reading of the case comports with this Court's precedents.

[8] The Government and the habeas petitioners agree that a jurisdictional rule that allows citizens to petition federal courts to challenge their detention until they are convicted by a foreign court makes no sense. *See, e.g.*, Gov. Br. 28-29.

D. The Government's Proposed Rule Of Decision Conflicts With This Court's Decisions.

Not only does the Government's limitation on habeas jurisdiction find no support in this Court's precedent; it squarely conflicts with it. This Court has long recognized that federal courts have jurisdiction to entertain writs of habeas corpus filed by American citizens to challenge the lawfulness of their detention by American officials *precisely because they are American citizens.*

Merely two years after this Court decided *Hirota*, it decided *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950). There, the Court held that federal courts were without jurisdiction to entertain writs of habeas corpus filed by "enemy aliens overseas"—specifically, Germans imprisoned in Germany. *Id.* at 765. But in articulating the breadth of its holding, the Court carefully limited its scope. It concluded that American citizens were outside its embrace because "[t]his Court long ago extended habeas corpus" to citizens held outside the United States. *See id.* at 769. The Court explained the privileged role of American citizenship in the jurisdictional inquiry as follows:

> With the citizen we are now little concerned, except to set his case apart as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens. Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar. The years have not destroyed nor diminished the importance of citizenship nor have they sapped the vitality of a citizen's claims upon his government for protection. [*Id.*]

Eisentrager thus recognized that American citizens held abroad in American custody can avail themselves of the writ of habeas corpus.

The Court's recent cases reaffirm this proposition. In *Rasul*, for example, eight Justices of this Court "explicitly agreed that American citizens held by American officials overseas could invoke habeas jurisdiction." *Munaf*, 482 F.2d at 585 (Randolph, J., concurring in the judgment). In that case, the Court observed that aliens held at the Guantanamo Bay Naval base in Cuba, "*no less than American citizens*, are entitled to invoke the federal courts' authority under § 2241." *Rasul*, 542 U.S. at 481 (emphasis added). The Court went on to explain that "[a]pplication of the habeas statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus." *Id.*

The dissent did not take issue with the proposition that American citizens held outside the territorial United States could avail themselves of the writ of habeas corpus; it embraced this proposition as well. Justice Scalia, writing for himself as well as Chief Justice Rehnquist and Justice Thomas, noted that "[n]either party to the present case challenges the atextual extension of the habeas statute to United States citizens held beyond the territorial jurisdictions of the United States courts." *Id.* at 497 (Scalia, J. dissenting). He also recognized that there was a good reason for this: "[T]he position that United States citizens throughout the world may be entitled to habeas corpus rights * * * is *precisely* the position that this Court adopted in *Eisentrager*." *Id.* at 502 (Scalia, J. dissenting) (emphasis added).

Then there is of course *Hamdi*, decided during the very same term as *Rasul*, in which the Court specifically put this broad understanding of an American citizen's entitlement to the writ of habeas corpus to practice. *See* 542 U.S. at 531. Like petitioners in these cases, Hamdi, an American citizen, was detained as a result of our Nation's participation in multinational military operations in Afghanistan.

See 542 U.S. at 510; *see supra* at 17-19. But, as discussed above, in reviewing his habeas petition, not a single Justice found jurisdiction wanting. *See supra* at 17-19. Instead, the plurality "reaffirm[ed] * * * the fundamental nature of a citizen's right to be free from involuntary confinement by his own government without due process of law." *Id.* at 531.

The Government is hard-pressed to explain how its multinational-force limitation can be squared with this Court's recognition in *Eisentrager*, *Rasul* and *Hamdi* that federal courts have jurisdiction to entertain writs of habeas corpus filed by Americans held in American custody to test the legality of their detention—regardless of whether their American jailers are participants in a multinational military enterprise. Judge Randolph, in his separate concurrence in *Munaf*, recognized as much: He explained that "[t]o extend *Hirota* to habeas petitions filed by American citizens not only would contradict *Eisentrager*," but would also contradict "the majority and dissenting opinions in *Rasul*." 482 F.3d at 585 (Randolph, J., concurring in the judgment). Even the majority in *Munaf* noted that this Court's decisions in *Hamdi* and *Rasul* "are grounds for questioning *Hirota*'s continued vitality." *Id.* at 585. This Court should reject the Government's asserted jurisdictional limitation now.

E. The Government's Rule Would Create Perverse Incentives To Detain American Citizens Under The Auspices Of Multinational Military Operations As A Way To Circumvent Judicial Review.

The upshot of the Government's asserted limitation on federal courts' habeas jurisdiction is that the Executive would have unbridled discretion to detain American citizens free of any judicial supervision so long as it acts under the auspices of a multinational arrangement. Such an incentive would have per-

verse consequences, not the least of which is that the Government would have available to it a ready-made way of circumventing the core holding of *Hamdi*.

The Court in *Hamdi* recognized the type of "perverse incentive[s]" that a jurisdictional rule like the one the Government wants here would trigger. *Hamdi*, 542 U.S. at 524 (plurality op.). There, the Court noted that a habeas rule that turned on where an American citizen is held would present "[m]ilitary authorities * * * the stark choice of submitting to the full-blown criminal process or releasing a suspected enemy combatant captured on the battlefield." *Id.* As a result, military authorities would be encouraged to "simply keep citizen-detainees abroad." *Id.*

The incentives created by the jurisdictional rule the Government proposes here are no less perverse. For the rule would encourage the Government to assert custody over American citizens under the auspices of multinational arrangements in order to obtain the sole discretion to determine whether the citizens are entitled to the most elemental right to challenge the lawfulness of their detention. The Executive would thus have at hand "nothing less than the unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained and who will detain him." *Abu Ali*, 350 F. Supp. 2d at 40. The constitutional obligations that the Executive owes to the citizens of this Nation effectively would be optional whenever it participated in multinational endeavors.

That result would be particularly troubling because it would offer the Government an expedient way to evade the rule of law this Court announced in *Hamdi*. If the Government could evade federal court habeas jurisdiction simply by invoking multinational authorization it would be under no obligation to provide people captured in multinational military

operations any due process of law, including the right to challenge the factual basis of their detention before a neutral decisionmaker. *See* 542 U.S. at 509, 535. *Hamdi* clearly intended to prevent that injustice.

F. The Government Is Wrong That The Separation-Of-Powers Doctrine Supports The Rule That It Draws From *Hirota*.

The Government argues that "[t]he restraint called for by *Hirota* is supported by fundamental separation-of-powers principles." Gov. Br. 23. Not so. The Government's view of separation of powers would actually collapse the Constitution's structural separation of powers by arrogating to the Executive power that is vested in the Judiciary. Concentrating that sort of power in the Executive would undermine the very aim of the structural separation of powers: to promote individual liberty. In any event, this Court has already rejected the same mistaken view of the separation of powers that the Government advances here.

1. The Executive's Commander-in-Chief power does not trump the Judiciary's protection of individual liberties, for "[a] state of war is not a blank check for the President when it comes to the rights of the Nation's citizens." *Hamdi*, 542 U.S. at 536. Even during times of military conflict, the Constitution mandates a role not only for the Article II Commander-in-Chief but also for the Article III Judiciary: To evaluate the lawfulness of Executive detention in view of the fundamental individual liberty at stake. Thus, "the Great Writ of habeas corpus allows the Judicial Branch to play a necessary role in maintaining the delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions." *Id.*

This judicial check on Executive authority was important to the Founders, who were rightly suspicious of an Executive vested with unbridled military power permitting it to detain citizens at will. As this Court has explained, the Founders "knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 125 (1866). This deep distrust of Executive military power runs throughout the *Federalist Papers*. *See, e.g.*, *The Federalist No. 45* (Madison) (explaining that "the blessings of liberty" are jeopardized by "those military establishments which must gradually poison its very fountain"). As Justice Scalia has emphasized, no fewer than "10 issues of the Federalist were devoted in whole or part to allaying fears of oppression from the proposed Constitution's authorization of standing armies in peacetime." *Hamdi*, 542 U.S. at 568 (Scalia, J., dissenting).

The writ of habeas corpus that the Founders enshrined in the Constitution is central to the Judiciary's ability to check the Executive: It stands as the procedural "bulwark" against Executive overreaching through abusive detentions. *The Federalist No. 84* (Hamilton). Thus, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of executive detention, and it is in that context that its protections have been *strongest*." *INS* v. *St. Cyr*, 533 U.S. 289, 301 (2001) (emphasis added). Yet, it is in this very context—the review of the legality of detentions of American citizens by American jailers through the writ of habeas corpus—that the Government now claims absolutely *no* protections exist.

That belief is not supported by the Constitution's separation of powers; it is at war with the very purpose of that structural safeguard. The Constitution's separation of powers is designed to preserve liberty by creating checks and balances through divided enumerated powers. *See Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2800 (2006) ("Concentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid.") (Kennedy, J., concurring). It was indeed "the central judgment of the Framers of the constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." *Mistretta* v. *United States*, 488 U.S. 361, 380 (1989). Thus, "[t]he very core of the liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi*, 542 U.S. 554-555 (Scalia, J., dissenting).

The consolidation of power within the Executive Branch that the Government seeks would thus invert our constitutional system of checks and balances. To be clear: "[I]t would turn our system of checks and balances on its head to suggest that a citizen could not make his way to court with a challenge to the factual basis for his detention by his Government, simply because the Executive opposes making available such a challenge." *Hamdi*, 542 U.S. at 536-537 (plurality op.). That result would indeed invite the very abuses that the Founders so feared. *See id.* at 530 ("history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse"). As James Madison warned us, "[t]he accumulation of all powers legislative, executive and judicial, in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny."

The Federalist No. 47 (Madison). Indeed, a world of unrestrained "[e]xecutive power to detain an individual" is undoubtedly "the hallmark of the totalitarian state." *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 723 (1990) (Stevens, J., dissenting). The Court should now deny the Executive such dangerous and unchecked power—again.

2. This Court recently considered and emphatically rejected the premise that separation-of-powers principles preclude Article III courts from entertaining writs of habeas corpus filed by American citizens to contest the legality of their detention during the present American-led global operation to combat terrorism. *See Hamdi*, 542 U.S. at 535-537; *Rasul*, 542 U.S. at 485 ("[T]he federal courts have jurisdiction to determine the legality of the Executive's potentially indefinite detention of individuals who claim to be wholly innocent of wrongdoing."). In *Hamdi*, the court entertained a writ of habeas corpus filed by an American citizen and went on to hold that enemy combatants held by the United States must be given a meaningful opportunity to contest the factual basis for their detention before a neutral decisionmaker. *See* 542 U.S. at 509, 535. In so holding, the Court "necessarily reject[ed] the Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances." *Id.* at 535.

The Court's justification for rejecting the Government's understanding of separation of powers was simple and clear: A view of separation of powers that "serves only to *condense* power into a single branch of government" is fundamentally "unreasonable." *Id.* at 536. (emphasis in original). Far from being a mechanism designed to consolidate power within a single Branch of government, the Court explained that the Constitution's division of labor among three Branches was designed to protect

individuals from the excesses of a single Branch: "Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, *it most assuredly envisions a role for all three branches when individual liberties are at stake.*" *Id.* (emphasis added).

As in *Hamdi*, the liberty interests at issue in these cases are "the most elemental of liberty interests—the interest in being free from physical detention by one's own government." *Id.* at 529. Accordingly, as the Court concluded there, "it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented here." *Id.* at 535. In these cases, the Court should reject once more the Government's vision of the Executive's constitutional role during wartime—*i.e.*, that the Executive alone is the competent constitutional actor in the arena of military detentions of American citizens.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals in No. 07-394 should be affirmed; the judgment of the Court of Appeals in No. 06-1666 should be reversed.

Respectfully submitted,

SHARON BRADFORD FRANKLIN
THE CONSTITUTION PROJECT
1025 Vermont Avenue, N.W.
Third Floor
Washington, D.C. 20005
(202) 580-6920

CHRISTOPHER T. HANDMAN*
PAUL A. WERNER
MICHAEL SEVI
HOGAN & HARTSON L.L.P.
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5719

JOHN W. WHITEHEAD
THE RUTHERFORD INSTITUTE
P.O. Box 7482
Charlottesville, VA 22906
(434) 978-3888

*Counsel of Record

Counsel for Amici Curiae

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In The
Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Petitioners,

v.

SANDRA K. OMAR AND AHMED S. OMAR,
as next friends of Shawqi Ahmad Omar,

Respondents.

MOHAMMAD MUNAF, et al.,

Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF FORMER U.S. DIPLOMATS AND NATIONAL SECURITY SPECIALISTS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

HAROLD HONGJU KOH
(*Counsel of Record*)
HOPE R. METCALF
RAMZI KASSEM
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN
RIGHTS CLINIC – NATIONAL
LITIGATION PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06510
(203) 432-1660

Counsel for Amici

February 2008

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	iii
Interest of *Amici*	1
Summary of Argument	2
Argument	3
I. The United States Government Is Responsible for the Actions of United States Forces Operating Under Its Effective Command and Control	6
A. The structure, operation and legal history of the MNF-I confirm that the U.S., not the U.N., exercises command and control over MNF-I operations	8
B. The U.S. exercises effective command and control over all aspects of MNF-I detention operations	16
C. The U.S. Government bears legal responsibility under international law for the detentions at issue here	19
D. The structure of MNF-I detention operations precludes meaningful review of detention outside U.S. courts	24
II. The Right of United States Citizens to the Writ of Habeas Corpus Under the U.S. Constitution Cannot Be Suspended Simply by Participation in a Multinational Force	26

TABLE OF CONTENTS – Continued

Page

A. U.S. citizens held overseas under effective U.S. control are entitled to habeas corpus to challenge their detention 26

B. *Hirota v. MacArthur* does not divest this Court of habeas jurisdiction 28

C. Under international law, U.N. authorization does not immunize the United States from judicial accountability with respect to the detentions of Omar and Munaf 34

Conclusion 37

Appendix: Qualifications of *Amici* ..... App. 1

TABLE OF AUTHORITIES

Page

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Braden v. 30th Judicial Circuit Ct., 410 U.S. 484 (1973) 27

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Page

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Page

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Page

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TABLE OF AUTHORITIES – Continued

Page

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Page

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INTEREST OF *AMICI*[1]

Amici are former U.S. diplomats and national security specialists who have collectively participated in the creation and structuring of numerous multinational forces.[2] *Amici* deny that U.S. civilian courts are somehow divested of habeas jurisdiction to hear claims of U.S. citizens held abroad by U.S. armed forces in Iraq simply because those U.S. forces participate in an operation that carries a multinational label.[3] To the contrary, *Amici*'s hands-on experience with multinational forces confirms that the exercise of habeas jurisdiction by U.S. courts on behalf of American citizens challenging their detention by U.S. forces participating in the Multinational Force in Iraq is expected, legal, appropriate, and in no way presents the dire foreign affairs crisis suggested by the Government.

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[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than *amici* and their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] For a full listing of the qualifications of *amici*, *see* Appendix.

[3] *Amici* take no position on the scope of the injunctive relief ordered by the district court.

SUMMARY OF ARGUMENT

Shawqi Omar and Mohammad Munaf are U.S. citizens being detained by U.S. soldiers under U.S. command in the Multinational Force in Iraq ("MNF-I"). Under United States and international law, they have a legal right to seek a writ of habeas corpus to challenge their detention. The Solicitor General argues that the MNF-I's multilateral affiliation effectively immunizes its actions from judicial scrutiny. Ironically, the Government suggests that MNF-I's mandate under international law somehow exempts it from clear international law obligations to recognize the availability of habeas corpus to detained prisoners.

The Solicitor General's brief claims that the mere act of U.N. authorization – without any meaningful change in U.S. command and control – automatically nullifies a U.S. citizen's right to a writ of habeas corpus. But U.S. habeas jurisdiction is an integral component of the existing system of U.S. command and control and bolsters its accountability. This is particularly true where, as here, the U.S. citizens being detained are being held in a U.S. military facility by U.S. armed forces commanded and controlled by U.S. military leaders.

In Iraq, the United States government remains fully responsible for the actions of its own soldiers toward its own citizens. Preservation of effective U.S. command and control does not preclude, but rather anticipates, that judicial accountability for illegal

detentions of U.S. citizens will be maintained through the exercise of civilian court habeas jurisdiction.

The Solicitor General's position is contrary to the established habeas rights of U.S. citizens, breaks with U.S. military and diplomatic practices, and is contrary to the overwhelming weight of international law and custom. *Amici* believe that United States foreign policy interests are ill-served by the claim that our country's military personnel should answer to no law, especially when the mere fact of U.N. authorization is cited to deny American citizens their day in court. This Court should hold that the act of U.S. participation in MNF-I does not suspend the right of United States citizens to the writ of habeas corpus.[4]

ARGUMENT

The Solicitor General claims that U.S. courts lack jurisdiction to review habeas petitions filed on behalf of U.S. citizens in any case where citizens are "held by a multinational force abroad *pursuant to international authority.*" Gov't Brief, at 12 (emphasis added). Yet this sweeping statement blurs the practical

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[4] To so hold, this Court need not decide whether and when habeas relief may be available in two other factual situations not presented here: when foreign nationals are detained by multinational forces under American command and control, or when American citizens are detained by multinational forces under the effective command and control of an international body.

differences among the various kinds of multinational forces abroad that operate pursuant to international authority. Contrary to the Government's suggestion, all MNFs are not equally "international." "In many ways traditional U.N. peacekeeping and U.N.-authorized military enforcement actions are at opposite ends of the spectrum of U.N. military involvement in a conflict zone."[5]

"Blue Helmet" peacekeeping forces under the aegis of the U.N. or other international organizations operate with troops voluntarily contributed by member states,[6] funded by their assessed contributions

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[5] Hilaire McCoubrey & Nigel D. White, THE BLUE HELMETS: LEGAL REGULATION OF UNITED NATIONS MILITARY OPERATIONS 19 (1996). The term "Blue Helmet" technically refers to the helmets worn by U.N. peacekeepers or peace enforcers carrying arms under the U.N. flag. John Hillen, BLUE HELMETS: THE STRATEGY OF U.N. MILITARY OPERATIONS 29-30 (2000). *Amici* use that term to describe all forces that operate analogously to U.N.-controlled operations by being effectively organized and commanded by international, intergovernmental bodies.

[6] Genuinely international forces usually enjoy meaningful participation from the militaries of many nations from the outset. *See, e.g.*, U.N. Mission in Haiti, *Facts and Figures*, http://www.un.org/Depts/dpko/missions/minustah/facts.html (detailing the multinational composition of the command structure and contributions of the nations involved). Even where one country contributes the majority of the soldiers to a Blue MNF, other participating countries still make significant contributions in the form of military force contributions, or logistical or technical support and funding. Crucially, the international body organizing the force appoints its commander and exercises actual operational control over personnel for the duration of the mission. *See infra*, note 7.

and under the control of a force commander appointed by the international organization.[7] By contrast, "Green Helmet" forces, even those that are authorized by the U.N. or other international organizations, are composed of troops not under U.N. control, but rather

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[7] Though force-contributing states in a typical U.N.-run coalition retain a measure of control over their contingents, especially with regard to the troop discipline, the rules of engagement and use of lethal force, the U.N.-appointed commander exercises command and control over most other significant operations. *See, e.g.*, THE BLUE HELMETS: A REVIEW OF UNITED NATIONS PEACE-KEEPING 405 (2d ed. United Nations, 1990) ("A United Nations peace-keeping operation consists of a commander who is designated Force Commander ... and a number of contingents provided by selected Member States ... upon the request of the Secretary-General.... The military personnel of an operation, although remaining in their national service are, during the period of the assignment to the operation, international personnel under the authority of the United Nations and subject to the instructions of the [U.N.] commander, through the chain of command."). For example, the Secretary-General typically negotiates the status of forces agreement. *See* The Convention on the Safety of United Nations and Associated Personnel, Art. 4, G.A. Res. 51/137, 51 U.N. GAOR Supp. (No. 49), U.N. Doc. A/51/49 (Vol. I) (1996), *available at* http://www.un.org/law/cod/safety.htm ("The host State and the United Nations shall conclude as soon as possible an agreement on the status of the United Nations operation and all personnel engaged in the operation including, *inter alia*, provisions on privileges and immunities for military and police components of the operation."). In addition, the U.N.-appointed force commander reports directly to the Special Representative of the U.N. Secretary-General, who is in overall command of the mission. S.C. Res. 743, U.N. Doc. S/RES/743 (Jan. 31, 1992) (Croatia, Bosnia & Herzegovina); S.C. Res. 872, U.N. Doc. S/RES/872 (Jun. 22, 1993) (Rwanda).

under the "unified command" of one or more national militaries.[8]

By any measure, MNF-I is a Green Helmet force under effective U.S. command and control. Legal and historical precedents confirm that habeas jurisdiction attaches whenever U.S. forces acting as part of a multinational force exercise effective command and control over a detained U.S. citizen. Under those circumstances, detained U.S. citizens like Omar and Munaf do not forfeit their habeas rights.

I. The United States Government Is Responsible for the Actions of United States Forces Operating Under Its Effective Command and Control.

As diplomatic practitioners, *Amici* confirm that the general practice of the United States when participating in multinational military activities – whether or not

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[8] A recent example is the initial U.S. role in what became a multinational force in Afghanistan. Operation Enduring Freedom began with force command and control vested entirely with the U.S. *See, e.g.*, Nicolas Kredel, OPERATION "ENDURING FREEDOM" AND THE FRAGMENTATION OF INTERNATIONAL LEGAL CULTURE: COMPARING U.S. COMMON LAW AND CIVIL LAW PERSPECTIVES ON THE INTERNATIONAL USE OF FORCE 48-57 (2006) (describing the origination and management of Operation Enduring Freedom in Afghanistan). Additionally, Green Helmet operations of this sort differ in significant ways from Blue Helmet operations, in that they "operate[ ] with open-ended mandates and . . . undertake long-range planning and maintain autonomy." Paul F. Diehl, INTERNATIONAL PEACEKEEPING 134 (1993).

those activities are endorsed or authorized by the U.N. – is to form arrangements that leave undisturbed both U.S. command and control and the normal jurisdiction of U.S. military and civilian courts as part and parcel of that command and control.[9]

With respect to the Multinational Force in Iraq, three points are clear. First, the relevant question for this Court is not whether MNF-I generally acts under color of international authority, but *whether the MNF-I forces who detained Omar and Munaf are U.S. soldiers acting under effective U.S. command and control.* Second, the political, legal and historical record in Iraq shows that the United States deliberately arranged its participation in MNF-I so that only U.S. authorities would have command and control over all aspects of its armed forces, including the detention of prisoners. Third, under relevant law and practice, actions of United States forces operating under U.S. command and control in a UN-authorized MNF are legally attributable to the United States, not the United Nations. Where detention of U.S.

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[9] *See* Presidential Decision Directive 25, signed by President Clinton May 1994, reproduced in *United States Administration Policy on Reforming Multilateral Peace Operations*, 33 I.L.M. 795, 798 (1994) (stating that "the President ... will never relinquish command authority over U.S. forces" and will "consider placing appropriate U.S. forces under the operational control of a competent U.N. commander for specific U.N. operations authorized by the Security Council"). It appears that this policy directive was never rescinded by the subsequent administration.

nationals is at issue, United States officials remain fully accountable to a U.S. civilian court through the writ of habeas corpus.

A. The structure, operation and legal history of the MNF-I confirm that the U.S., not the U.N., exercises command and control over MNF-I operations.

From the first presence of U.S. troops on Iraqi soil in March of 2003, the U.S. has expressly and repeatedly confirmed its national command and control over U.S. forces in Iraq, and the U.N. has affirmed this policy choice. In many multinational military interventions, an international civilian entity is created to take over control of a troubled country at the time of the introduction of military forces. In Iraq, however, the initial invasion and occupation of Iraq by the U.S. and U.K. occurred in the Spring of 2003, without U.N. authorization.

The U.S. maintained the firm position that Security Council authorization would not displace the preexisting command structure that placed U.S. CENTCOM in effective and ultimate control. In the two months between occupation and U.N. recognition,[10] the U.S. expressly asserted command and control of coalition troops in accordance with its

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[10] *See* S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003).

unique role as occupying power.[11] And in September 2003, in anticipation of the Security Council's authorization of MNF-I, then-Secretary of State Colin Powell said that "the U.S. will remain the commander of the unified command. . . ."[12]

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[11] In a May 8, 2003 letter to the President of the U.N. Security Council, the Permanent Representatives of the U.K. and U.S. declared that the United States will act "under *existing command and control arrangements* through the Commander of Coalition Forces," a U.S. military commander. Letter to the President of the Security Council, U.N. Doc. S/2003/538 (May 8, 2003) (emphasis added).

[12] Mark Matthews, *For U.N. Help, U.S. Promises Oversight Role*, BALT. SUN, Sep. 4, 2003, at 1A. Secretary Powell acknowledged that "there will be an element in the resolution that calls upon the United States as the leader of the military coalition to report on a regular basis to the United Nations, since it is a United Nations authorized multinational force, if the resolution passes," but he in no sense suggested that such a reporting requirement ceded any element of effective command and control to the United Nations. *Id.* Indeed, General Casey, commander of MNF-I testified that there was "no reporting chain that goes back to the United Nations" and that U.N. authorization had no effect on U.S. command and control of MNF-I operations. *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (Jun. 24, 2004) (Statement of Gen. George W. Casey, Jr.); *The Imminent Transfer of Sovereignty of Iraq: Testimony Before the H. International Relations Comm.*, 108th Cong. (May 13, 2004) (statement of Lt. Gen. Walter L. Sharp, Director, Strategic Plans and Policy, The Joint Staff) ("[The MNF] is subordinate to General Abizaid as Commander, U.S. Central Command.").

In light of the United States's unambiguous position, the U.N. never sought to deploy Blue Helmet Forces or to exercise effective control over U.S. forces operating in Iraq under the auspices of MNF-I.[13] To the contrary, the text and history of the pertinent U.N. resolutions – along with the reports submitted pursuant thereto by the Secretary-General – demonstrate that the U.N. envisioned its own role in Iraq as a limited one that never purported to exert effective command or control over the MNF-I.

U.N. Security Council Resolution 1483 affirmed the authority and control of the Coalition Provisional Authority ("CPA") and the limited role of the U.N.

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[13] The absence of U.N. command and control over MNF-I is significant because when it so chooses, the United Nations plainly *does* have the power to create a Blue Helmet security force, comprised of multinational forces and subject to its effective command, under Chapter VII of the U.N. Charter. In 1978, for example, the U.N. Security Council established UNIFIL: "a United Nations interim force for Southern Lebanon for the purpose of confirming the withdrawal of Israeli forces, restoring international peace and security and assisting the Government of Lebanon in ensuring the return of its effective authority in the area, the Force to be composed of personnel drawn from Member States." S.C. Res. 425, U.N. Doc. S/RES/425, ¶3 (Mar. 19, 1978). UNIFIL is composed of peacekeeping forces from 27 different nations, and is headed by a Force Commander appointed by the Secretary-General, in addition to the Special Representative of the Secretary-General for Southern Lebanon. The Security Council has extended UNIFIL's mandate numerous times since 1978; its current mandate ends in August 2008.

itself.[14] Resolution 1483 recognized " . . . the specific authorities, responsibilities, and obligations under applicable international law of those states [i.e. the U.S. and the U.K.] as occupying powers under unified command. . . ." Unified command over any security operations was placed in the hands of the United States,[15] while the U.N. was afforded a carefully defined "role in humanitarian relief, the restructuring of Iraq, and the restoration and establishment of national and local institutions for representative governance." S.C. Res. 1483, ¶5, U.N. Doc. S/RES/1483 (May 22, 2003).

The Security Council never sought to exercise authority or control over the CPA.[16] The U.N.

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[14] The Coalition Provisional Authority was set up by occupying U.S. forces in April 2003 and functioned as a stand-in for an Iraqi government until June 2004. Rajiv Chandrasekaran, *Ties to GOP Trumped Know-How Among Staff Sent to Rebuild Iraq*, WASH. POST, Sep. 17, 2006, at A1. During this period, it remained a funded branch of the U.S. Department of Defense, with its American administrators, Lt. Gen. Jay Garner and L. Paul Bremer, reporting directly to Secretary of Defense Donald Rumsfeld. *See* Mike Allen, *Expert on Terrorism to Direct Rebuilding*, WASH. POST, May 2, 2003, at A1.

[15] Resolution 1546 specifies that the entire MNF-I serves under the "unified command" of the U.S. S.C. Res. 1546, ¶10 at 4, U.N. Doc. S/RES/1546 (Jun. 8, 2004).

[16] In fact, the opposite is true: the U.N., lacking a security force of its own, relied on negotiations with the United States as unified commander of the CPA and MNF-I to provide security for U.N. personnel in Iraq. *See, e.g.*, The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 124 of Resolution 1483 (2003) and Paragraph 12 of Resolution 1511 (2003)*,

(Continued on following page)

Secretary-General, in his first report made under Resolution 1483, acknowledged that command and control over security forces remained within the sole control of the CPA and that "executive law enforcement responsibilities are the sole responsibility of the [Coalition Provisional] Authority, under Resolution 1483 (2003) and international humanitarian law."[17]

Upon its creation in May 2004, the Green Helmet MNF-I expressly adopted the CPA's command and control structure that, as explained above, minimized U.N. oversight of multinational forces. *See* Coalition Provisional Authority Order Number 100, "Transition of Laws, Regulations, Orders, and Directives Issued by the Coalition Provisional Authority," CPA/ORD/28 (Jun. 2004). The MNF-I was created to replace the

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¶7, U.N. Doc. S/2004/625 (Aug. 5, 2004) ("The United Nations lacks the integral resources for the early discharge of its own security responsibilities in Iraq. Therefore, it will have to rely on the Interim Government of Iraq and the multinational force to provide its security."); The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546*, ¶21, U.N. Doc. S/2004/959 (Dec. 8, 2004) ("An agreement is being negotiated with the United States, as the State whose armed forces are vested with unified command of the multinational force, concerning protection by the multinational force of the United Nations presence in Iraq.").

[17] The Secretary-General, *Report of the Secretary-General pursuant to Paragraph 24 of Security Council Resolution 1483 (2003)*, ¶51, U.N. Doc. S/2003/715 (July 17, 2003). The Secretary-General considered but rejected the establishment of an international police force "*under United Nations auspices*" because he believed that to create a "*parallel system for law enforcement*" would not be effective. *Id.* (emphasis added).

security wing of the CPA, the Coalition Joint Task Force 7 (created on June 14, 2003), which had in turn replaced the Coalition Forces Land Component Command ("CFLCC"). At all relevant times, the Force Commander was a U.S. Army General.[18]

In three ways, U.N. Security Council Resolutions 1511 and 1546, adopted on October 16, 2003 and June 8, 2004, respectively, expressly refrained from asserting U.N. authority and control over MNF-I. First, the resolutions distinguished between the U.N.-led United Nations Assistance Mission for Iraq which would serve humanitarian functions, on one hand, and "a multinational force under unified command" to provide security enforcement, on the other. S.C. Res. 1511, ¶¶9, 13, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546 ¶¶7, 9, U.N. Doc. S/RES/1546 (Jun. 8, 2004). Second, the U.N. authorized the MNF-I because its presence "is at the request of the incoming Interim Government of Iraq," not because the MNF operated under U.N. Security Council auspices. *Id.* ¶9. That is, it is not U.N. action that renders the MNF-I's presence in Iraq lawful under international law. Nor did the U.N. assert the power to terminate the mandate of the MNF-I of its own accord – a power

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[18] *See* John Pike, *Coalition Joint Task Force 7 (CJTF 7)*, at http://www.globalsecurity.org/military/agency/dod/cjtf-7.htm. The CFLCC was commanded by Lt. Gen. David McKiernan, U.S. Army; CJTF-7 and MNF-I were commanded until the end of June 2004 by Lt. Gen. Ricardo Sanchez, U.S. Army, succeeded by Gen. George Casey, U.S. Army, and Gen. David Petraeus, U.S. Army, the present commander of MNF-I.

that it had expressly reserved for itself with respect to other multinational forces.[19] Third, the U.S. Government, as effective commander of the MNF – and not the Secretary-General or any other Member State – was given responsibility for reporting to the Security Council on the MNF's behalf. S.C. Res. 1511, *supra*, ¶25; S.C. Res. 1546, *supra*, ¶31.

Subsequent actions by the U.S. and the U.N. clearly show that Resolutions 1511 and 1546 only solidified U.S. control over MNF-I forces to the exclusion of any meaningful supervisory role by the U.N. The former U.S. commander of MNF-I operations repeated that there existed "no reporting chain that goes back to the United Nations."[20] Meanwhile, the U.S. has expressly declared that "U.S. and U.K. military forces retain legal responsibility for those prisoners of war and detainees in U.S. and U.K. custody respectively."[21]

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[19] *See, e.g.*, S.C. Res. 425, *supra*, at ¶2 ("The United Nations Interim Force [in Lebanon] shall be established . . . for an initial period of six months . . . It shall continue in operation thereafter, if required, provided the Security Council so decides.").

[20] *See Nomination of General George W. Casey, Jr., USA, for Reappointment to the Grade of General and to be Commander, Multinational Force-Iraq: Hearing Before the S. Comm. On Armed Svcs.*, 108th Cong. (Jun. 24, 2004) (Statement of Gen. George W. Casey, Jr.).

[21] Written Submission from the CPA to the U.N. High Commissioner for Human Rights, 28 May 2004, reproduced in THE OCCUPATION OF IRAQ: THE OFFICIAL DOCUMENTS OF THE COALITION PROVISIONAL AUTHORITY (2008) (Stefan Talmon, ed.).

In response, the U.N. has repeatedly cited its complete lack of control over those operations in a series of reports expressing concern over the potential illegality of the MNF-I's detention operations under international humanitarian law.[22] *See* The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546*, ¶72, U.N. Doc. S/2005/373 (Jun. 7, 2005) ("One of the major human rights challenges remains the detention of thousands of persons without due process. . . . Prolonged detention without access to lawyers and courts is prohibited under international law, including during states of emergency."). Human Rights Reports issued by the United Nations Assistance Mission in Iraq (UNAMI) have registered increasing alarm over the potentially illegal conditions of MNF-I detention. *See* U.N. Assistance Mission for Iraq, *Human Rights Report for the Period Nov. 1 – Dec. 31, 2005*, http://www.uniraq.org/documents/HR%20Report%20Nov%20Dec%2005%20EN.PDF (warning that holding detainees without access to judicial review is a violation of international law).

In sum, the U.S. has repeatedly confirmed that in Iraq, it, and not the U.N., exercises sole command and control over MNF-I detention operations. The

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[22] The Secretary-General has expressly called for the Multinational Force to act in accordance with international humanitarian and human rights law. *See, e.g.*, The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 30 of Resolution 1546 (2004)*, U.N. Doc. S/2006/360 (Jun. 2, 2006).

same U.S. command and control assumes the judicial accountability, not the immunity, of U.S. officials for claimed illegality arising out of those U.S.-controlled operations.

B. The U.S. exercises effective command and control over all aspects of MNF-I detention operations.

The policies and practices of MNF-I detention operations make clear that it is the U.S. – not the U.N. or the Interim Government of Iraq (I.G.I.) – that exercises effective command and control over the detention of individuals in the custody of U.S. troops in Iraq.

Coalition Provisional Authority Memorandum 3 and Order 99 provide for the basic structure of detention operations of national forces operating under the MNF-I umbrella. *See* Coalition Provisional Authority Memorandum 3, "Criminal Procedures." CPA/MEM/27 (Jun. 3, 2004); Coalition Provisional Authority Order 99, "Joint Detainee Committee," CPA/ORD/99 (Jun. 27, 2004). These documents empower each "national contingent of the MNF" to apprehend, detain, and classify internees for up to 18 months without any oversight of the U.N., I.G.I., or cooperating national contingents.

CPA 3 creates two categories of detainees: criminal detainees and security internees. Criminal detainees are "persons who are suspected of having committed criminal acts"; security internees are

persons detained for "imperative reasons of security." S/RES/1483 at §5(1). MNF-I national contingents have the "right to apprehend" both types of persons. *Id.* at §5(1), §6(1).[23]

In elaborating upon the structure provided by CPA Order 3, the U.S. MNF-I detention operation has placed final authority to detain or release an internee in the hands of a U.S. official, with no oversight or review from an alternate sovereign or organization. In 2004, a body called the Combined Review and Release Board (CRRB) was established, comprising two representatives each from the Iraqi ministries of Justice, the Interior, and Human Rights and three MNF officers. News Release, U.S. CENTCOM, *Detainee Release Board Reviews 300 Cases During First Week*, Aug. 30, 2004, *available at* http://www.globalsecurity.org/wmd/library/news/iraq/2004/08/iraq-040830-centcom01.htm. This body is responsible for periodic review of the detainee's status. But the CRRB only possesses the

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[23] A detainee is afforded differing procedural rights dependent upon his classification. A criminal detainee has the right against self-incrimination, to consult an attorney, to be advised of the charges against him, and to be brought before a judicial officer no later than 90 days from date of induction into the detention center. *Id.* at §5(1)(a)-(d). A security internee has no right to counsel. Each security detainee receives review at six month intervals, *id.* at §6(1)-(5), and any application over continued detention over 18 months must be made to the Joint Detention Committee, which is composed of Iraqi and U.S. officials. *Id.* at §6(6); CPA/ORD/99, §2(1). As explained above, however, ultimate authority to detain or to release rests with the U.S. command.

power to make recommendations regarding a detainee's status. "The final approval for all releases rests with the MNF's Deputy Commanding General for Detainee Operations[.]" *Id.* Ultimate authority to release a detainee rests with the U.S., and the decision to release or continue detention at this highest level is non-reviewable.[24]

The practice of U.S. MNF-I detention reinforces the formal arrangements that places the U.S. in full and effective control of U.S. detention in Iraq. "In a real sense, the strength of a criminal case begins and ends with [coalition forces]." Maj. W. James Annexstad, *The Detention and Prosecution of Insurgents and Other Non-Traditional Combatants*, ARMY L. 72, 75 (Jul. 2007) (describing that the decisions to apprehend, detain, charge, classify, and transfer a detainee are made by U.S. Task Force 134 before Iraqi authorities are contacted); *see also,* Walter

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[24] The structure of U.K. MNF-I detention, held by the *Al-Jedda* court to be in the effective control of the U.K., is parallel to that of the U.S., with a British Divisional Internment Review Committee ("DIRC"), which shares responsibility for detention review with a Combined Review and Release Board ("CRRB") composed of Iraqi and U.K. members. Committees on Defence and Foreign Affairs, *Supplementary Memorandum from the Ministry of Defence* (Jan. 11, 2007), available at http://www.publications.parliament.uk/pa/cm200607/cmselect/cmdfence/209/7011108.htm. Following reviews, the CRRB "makes recommendations to the DIRC for consideration." *Id.* As the U.K. Ministry of Defense made clear in a submission to the Select Committee on Defence, this system of review "mirrors the U.S. process, in which the CRRB's recommendations are considered by the Commanding General of MNF-I." *Id.*

Pincus, *U.S. Holds 18,000 Detainees in Iraq: Recent Security Crackdown in Baghdad Nets Another 1,000*, WASH. POST, Apr. 15, 2007, at A24 (quoting military spokesman attesting that the "initial decision to detain or release those arrested is made by a U.S. unit commander with the assistance of an Army lawyer.").

Further, any belief that the Iraqi presence on the CRRB transforms detention into a joint endeavor between Iraq and the U.S. is belied by the words of former Iraqi Minister of Justice, Abdul Hussein Shandal who stated, in reference to Iraqi participation in the CRRB process: "The representatives of the MNF in the committee have the rights and *all the authority* under the UN resolution." Mariam Karouny & Alastair Macdonald, *Iraqi Minister Slams U.S. Detention Policy*, REUTERS (Sep. 14, 2005) (emphasis added). He described detention by MNF-I forces as "overseen by the Multinational Force and . . . not in the control of the justice ministry." *Id.*

C. The U.S. Government bears legal responsibility under international law for the detentions at issue here.

When ascribing legal responsibility for the actions of troops engaged in multinational forces, the determinative test is "effective command and control." That test comports with the widely accepted rule of international law that the actions of forces such as the MNF-I – including detention of citizen

prisoners – are attributable to the force-contributing state – here, the United States – whose contingent exercises effective control over the actions at issue. The International Law Commission (ILC) and the U.N. Secretariat confirm that under relevant international law, a test of "effective control" determines when a national force bears legal responsibility for an MNF's actions.[25]

The International Law Commission's Draft Articles on the Responsibility of International Organisations make clear that U.N. authorization alone does not absolve a Member State of primary responsibility for the State's actions.[26] The ILC's authoritative

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[25] This Court has recognized the ILC as "[e]stablished by the United Nations General Assembly in 1947 to codify international law," and has often relied upon ILC opinions to inform its construction of treaties. *United States v. Louisiana*, 394 U.S. 11, 1623, 28 n.7 (1969); *see also United States v. Alaska*, 521 U.S. 1, 24-25 (1997) (relying upon ILC draft articles to illustrate meaning of Convention on the Territorial Sea and the Contiguous Zone). Article 13 of the United Nations Charter provides that the General Assembly shall initiate studies and make recommendations for the "progressive development of international law and its codification." U.N. Charter, art. 13, ¶4. Most of the major drafts of the ILC have been adopted as international conventions. International Law Commission, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001).

[26] International Law Commission, *Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6 and 7 Adopted by the Drafting Committee*, U.N. Doc. A/CN.4/L.648 (May 27, 2004). The ILC's draft articles on Responsibility of International Organisations resulted from a request of the U.N. General Assembly in December 2001. G.A.

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commentary clarifies that "the decisive question in relation to attribution of a given conduct appears to be who has *effective control* over the conduct in question." International Law Commission, *Report to the General Assembly,* U.N. GAOR, 56th session, Supp. No. 10, U.N. Doc. A/59/10 (2004) (emphasis added).[27]

The U.N. Secretariat has articulated the same test of effective control for determining responsibility: "In joint operations, namely, those conducted by a United Nations peacekeeping operation and an operation conducted under national or regional command and control, *international responsibility lies where effective command and control is vested and practically exercised.*" U.N. Doc. A/CN.4/545, at ¶¶17-18 (Jun. 25, 2004) (emphasis added). The Secretariat further emphasized that "the Council itself or the United Nations as a whole cannot be held responsible for an unlawful act by the State conducting the operation, for the *ultimate test of responsibility remains*

Res. 56/82, ¶8, U.N. Doc. A/RES/56/82 (Dec. 12, 2001) ("[The General Assembly] [r]*equests* the International Law Commission, taking into account paragraph 259 of its report, to begin its work on the topic 'Responsibility of international organizations' and to give further consideration to the remaining topics to be included in its long-term programme of work, having due regard to comments made by Governments.").

[27] "The conduct of an organ of a state . . . that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization *if the organization exercises effective control over that conduct.*" International Law Commission, *Report to the General Assembly,* ¶109, U.N. Doc. A/59/10 (2004) (emphasis added).

'effective command and control.'" U.N. Doc. A/CN.4/556, at 46 (May 12, 2005) (emphasis added).

The House of Lords recently applied the effective control test to this very force, MNF-I, when it held that a U.K. national could bring an action in U.K. courts for actions by the U.K. forces in MNF-I. In *R. (on the application of Al-Jedda) v. Secretary of State for Def.*, [2007] U.K.H.L. 58, whose facts are strikingly parallel to the instant case, the appellant was detained by U.K. forces in MNF-I without trial or charge for over two years and successfully challenged his detention before the House of Lords. *Id.* at ¶¶1-3.

The majority cited the ILC in following the effective control test. *Id.* at 5. Lord Bingham, writing for the majority, applied a five-part test to determine whether the U.K. exercised effective control:

> Were UK forces placed at the disposal of the U.N.? Did the U.N. exercise effective control over the conduct of UK forces? Is the specific conduct of the UK forces in detaining the appellant to be attributed to the U.N. rather than the UK? Did the U.N. have effective command and control over the conduct of UK forces when they detained the appellant? Were the UK forces part of a U.N. peacekeeping force in Iraq?

Id. at ¶22.

Applying the effective control test, the House of Lords decided that MNF-I should be considered a Green Helmet force because: (1) The U.N. did not

dispatch coalition forces; (2) The Coalition Provisional Authority (CPA) was established by the U.S., not the U.N.; and (3) "at no time did the US or the UK disclaim responsibility for the conduct of their forces or the U.N. accept it. It cannot realistically be said that US and UK forces were under the effective command and control of the U.N." *Id.* at ¶23.

The House of Lords Decision in *Al-Jedda* supports a conclusion here that effective control of the U.S. soldiers in the MNF-I, resides with the U.S., not the U.N. *Al-Jedda*'s reasoning confirms that U.S. forces under effective U.S. command and control remain legally responsible for their actions. The U.S. retains full legal responsibility for detention of civilians such as Omar and Munaf without trial or charge.[28] Nowhere did the U.S. officials who created MNF-I evince the slightest intent to remove American forces under their command and control from U.S. judicial authority. Given that neither the U.S. nor the U.N. has ever stated any intent to disrupt U.S. command and control over MNF-I – and that

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[28] The House of Lords' reasoning is confirmed by *Behrami v. France and Saramati v. France, Germany and Norway*, 45 E.Ct. H.R. 1 (2007), where the European Court of Human Rights similarly relied upon the ILC's "effective control" test in analyzing the status of the multinational forces in Kosovo and attributing responsibility for their actions. As in *Al-Jedda*, the *Behrami* Court focused on who exercised effective command and control over the multinational force. In both cases, the Court concluded that the multinational NATO military force in Kosovo, KFOR, was under effective international control, not the control of the individual member states. *Id.* at 39.

maintaining judicial accountability plays a critical role in preserving that command and control – the jurisdictional reach of U.S. military and civilian courts over U.S. forces remains undiminished.

D. The structure of MNF-I detention operations precludes meaningful review of detention outside U.S. courts.

Absent the availability of habeas corpus in a U.S. federal court, the structure of MNF-I detention operations precludes alternative forms of meaningful review of detention of a U.S. citizen by a U.S. custodian in Iraq. Within the MNF-I detention scheme, an American citizen detained by U.S. forces in Iraq operating under the umbrella of the MNF-I may be detained indefinitely, without counsel, and without access to any independent or meaningful review of his classification as a "security internee."[29]

Similarly, should a U.S. citizen be labeled a "criminal detainee" at some point in his detention and later transferred to the Central Criminal Court of Iraq, that court will have no jurisdiction to review his

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[29] *See* Amnesty International, *Beyond Abu Ghraib: Detention and Torture in Iraq*, MDE 14/001/2006 (Mar. 6, 2006), http://asiapacific.amnesty.org/library/Index/ENGMDE140012006?open&cf=ENG-IRQ (describing MNF-I procedures, including denial of opportunity to contest charges and lack of meaningful review by CRRB).

detention at the hands of the MNF-I.[30] Nor would a U.S. citizen detained by U.S. troops in Iraq have recourse to any alternate tribunals, such as the International Court of Justice ("ICJ") or the International Criminal Court ("ICC").[31]

The Solicitor General's position in this case, which would incapacitate the federal judiciary and leave U.S. citizens to be tried by foreign courts, cannot be squared with the U.S. Government's current reluctance to have U.S. citizens tried by such judicial bodies as the International Criminal Court. And it would be ironic indeed if member nations could invoke U.N. authorization to avoid judicial scrutiny of international human rights violations. As diplomatic practitioners, *Amici* have always assumed that the institutions of the U.S. government will exercise effective jurisdiction and control over its own military

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[30] CPA/MEM/03, §5(3) (establishing that Central Criminal Court of Iraq has no jurisdiction to review the legality of the detention at hands of MNF-I).

[31] For the ICJ to review Petitioners' detention, the U.S. would have to make an application against itself before the ICJ, as only states may be parties before that tribunal – a scenario that is both procedurally impossible and politically improbable. Statute of the International Court of Justice, art. 34, June 26, 1945, 59 Stat. 1055, 1059, T.S. No. 933 ("Only states may be parties in cases before the Court."). Moreover, neither Iraq nor the U.S. is a State Party to the Rome Statute, which leaves the ICC with no jurisdiction to review Omar and Munaf's claims of illegal detention. *State Parties to the Rome Statute of the ICC*, http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp (last visited February 20, 2008).

personnel. It ill-serves United States foreign policy interests to claim that our country's military personnel answer to no law, especially when the mere fact of U.N. authorization is used to deny American citizens their day in court.

II. The Right of United States Citizens to the Writ of Habeas Corpus Under the U.S. Constitution Cannot Be Suspended Simply by Participation in a Multinational Force.

American participation in an international military force such as the MNF-I cannot suspend the Great Writ for U.S. citizens. To so hold would permit the executive to escape judicial review by fiat, a result anathema to the centuries-long history of habeas corpus. Instead, U.S. constitutional and military history teach that habeas jurisdiction attaches whenever U.S. forces – even those acting pursuant to international agreement – exercise effective command and control over a citizen detainee.

A. U.S. citizens held overseas under effective U.S. control are entitled to habeas corpus to challenge their detention.

American citizens held overseas by U.S. armed forces have a right to habeas corpus. "When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other

parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Reid v. Covert*, 354 U.S. 1, 6 (1957) (plurality op.). For U.S. citizens held abroad, the only relevant jurisdictional inquiry is whether an *ultimate* custodian – here, the Secretary of the Army – is within the territorial jurisdiction of the district court. *Braden v. 30th Judicial Circuit Ct.*, 410 U.S. 484, 495 (1973).

The mere fact that the U.S. force detaining the petitioner operates pursuant to U.N. authorization does not suffice to divest a court of habeas jurisdiction. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the sister of a former U.S. soldier held in Korea sought habeas in the D.C. federal courts on behalf of her brother, challenging his court-martial for a crime allegedly committed while serving with the United Nations Joint Command (UNJC) in that country. Despite its name, the UNJC was a multinational operation both established and operated by the United States Government. Like MNF-I, the UNJC was a "joint operation," under the effective command of the United States military, which was by far the largest contributor of ground forces, naval power, and air power in Korea. Although undertaken on the recommendation of the U.N. and supported by 16 participating member-states, the U.S. Government exercised effective command and control over the

military effort there.[32] In granting the writ, this Court never suggested that U.N. authorization of the multinational operation somehow divested U.S. courts of habeas jurisdiction over a U.S. citizen held in the U.S. military's custody. *Id.*

B. *Hirota v. MacArthur* does not divest this court of habeas jurisdiction.

The Solicitor General's sole authority for his claim that "United States courts lack jurisdiction to review the detention [by US forces] of individuals held abroad pursuant to international authority" is *Hirota v. MacArthur,* 338 U.S. 197 (1949), a nine-sentence opinion that has never since been cited by this Court. In *Hirota,* Japanese war criminals challenged the authority of General Douglas MacArthur, Supreme Commander of Allied Forces, to establish the International Military Tribunal for the Far East (IMTFE) as well as its adequacy of process. Brief for the Petitioner, at 16-19, *Hirota v. MacArthur,* 338 U.S. 197 (1949). In refusing to entertain the habeas petition, the Court tersely stated that *"under the foregoing circumstances* the courts of the United

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[32] In fact, unlike MNF-I, U.N. authorization *preceded* the creation of the multinational force in Korea. *See* S.C. Res. 84, U.N. Doc. S/RES/84 (Jul. 7, 1950). Yet the composition and command structure of the UNJC showed that the United States retained effective control of its participating forces. Indeed, the United Nations "had no legal powers over or in respect of the Force." Finn Seyersted, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 121-22 (1966).

States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners" without articulating which of "the foregoing circumstances" were dispositive. 338 U.S. at 198 (emphasis added).

The Solicitor General overreads *Hirota* as "establish[ing] that United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force." But *Hirota* established no such thing.

Congress alone – not the Executive, the U.N. or any other multinational body – has the power to suspend habeas corpus, and only then "in cases of rebellion or invasion." U.S. Const. art. I, § 9, cl. 2.[33] Nor can an executive agreement with foreign sovereigns authorize what the Constitution forbids.[34] These

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[33] *See, e.g.*, *Ex parte Bollman*, 8 U.S. 75, 101 (1807) ("If at any time the public safety should require the suspension of [habeas] . . . it is for the *legislature* to say so") (emphasis added); *Hamdi v. Rumsfeld*, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting on other grounds) ("[S]uspension must be effected by, or authorized by, a legislative act.").

[34] *See Reid*, 354 U.S. at 5-6 ("The United States is entirely a creature of the Constitution. Its power and authority have no other source. . . . [N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."). *See also Missouri v. Holland*, 252 U.S. 416, 432-34 (1929) (treaty cannot authorize national government "to do that which the Constitution forbids").

constitutional presumptions militate against reading *Hirota* so sweepingly. By the Government's logic, the Executive could unilaterally extinguish the habeas rights of U.S. citizens under U.S. control simply by entering into a multinational force agreement.[35] Nothing in *Hirota* authorized the Executive to carve out a habeas-free zone for U.S. citizens simply by entering into an accord with a foreign nation.

In *Hirota,* as here, the controlling "circumstances" cited as the basis for the Court's ruling were not – as the Government claims – whether there was an *international source of authority* for petitioners' detention, but rather, whether the U.S. exercised *effective command and control* over the detention. Although the United States played a leading role in the occupation and spearheaded the IMTFE, that tribunal was fundamentally international in its establishment and operations in ways that the MNF-I is plainly not.

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[35] The Government's claim that Congress' authorization of the use of military force to "enforce all relevant United Nations Security Council resolutions regarding Iraq," Authorization For Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § (3)(A)(2), 116 Stat. 1501 (2002), impliedly suspended Omar and Munaf's rights to habeas corpus violates this Court's requirement of "a clear indication that Congress intended that result." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). There is not the faintest suggestion in the authorization's text or legislative history that Congress intended to suspend habeas corpus with this authorization. *Cf. Demore v. Kim*, 538 U.S. 510, 517 (2003) ("[W]here a provision precluding review is claimed to bar habeas review, the Court has required a particularly clear statement that such is Congress' intent.").

Unlike MNF-I, which was stamped *ex post facto* with U.N. legitimacy, General MacArthur's authority to establish the IMTFE grew from a series of international agreements that preceded its founding.[36] Once established, the IMTFE was fully multilateral in its operations. Unlike MNF-I, where US CENTCOM does not report to the U.N. or Iraq, prosecutions by the tribunal had to be multilaterally approved and General MacArthur had to consult with Allied powers before modifying decisions of the tribunal. Each of the eleven IMTFE judges represented a member of the Allied nations and the Charter allowed for any Allied nation to appoint an associate counsel to assist the Chief of Counsel. *Id.* Art. 8(b). The indictments filed in the IMTFE were issued jointly by all eleven nations. *See*

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[36] On December 27, 1945, the United States, the USSR, and the United Kingdom – with China's concurrence – established the multilateral Far Eastern Commission (FEC) to oversee Japan's compliance with the Treaty of Surrender. Comprising eleven nations, the FEC's functions included "formulat[ing] the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished," and "review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission." *Agreement of Foreign Ministers at Moscow on Establishing Far Eastern Commission and Allied Council for Japan*, 27 Dec. 1945, Art. II(A)(1),(2), Documentary Appendix, at 14, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248). The FEC approved the establishment of the IMTFE, and each member state enjoyed the power to review and amend the IMTFE charter. Philip R. Piccigallo, THE JAPANESE ON TRIAL 10-11 (1980).

Indictment (lodged with the Tribunal on April 29, 1946), Documentary Appendix, at 49, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248).

The Government notes that "the tribunal's rulings were subject to modification by [General MacArthur]." Gov't Brief, at 20. But the FEC required him to consult with the diplomatic representatives of each Allied nation before rendering a decision. Richard R. Minear, VICTOR'S JUSTICE 160-61 (1973). That provision was added to ensure that those nations exerted influence over the Supreme Commander and the U.S. Executive. As litigants recognized at the time, a judicial finding sustaining Hirota's complaints would have amounted to a judicial abrogation of the international tribunal and nullified U.S. commitments.[37] Based on this lengthy record of Allied involvement, the U.S. State Department certified in *Hirota* that

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[37] The National Lawyers Guild wrote in an *amicus* brief that

> A decision by the Supreme Court of the United States to review the determinations of the [IMFTE] would, by violating the consensual acts of the co-equal Allied national states, impair the legal structure for the occupation of Japan, and imply to other Allied national states, that the United States, speaking through its Supreme Court, now regrets its agreements with its co-equal Allies, and in reviewing the proceedings and determinations of the [IMTFE] is contravening the international agreements made with them.

Brief for the National Lawyers Guild as *Amicus Curiae* Supporting Respondents, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248).

the IMTFE was an international, and not a domestic, tribunal, as did the IMTFE itself.[38]

Hirota thus stands only for the proposition that a U.S. court may not sit in habeas review of the rulings of a Nuremberg-like, international tribunal. Yet ignoring this history, the Solicitor General makes much of Justice Douglas's recognition that the FEC was required "to respect the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces." *Hirota,* 338 U.S. at 206 (Douglas, J., concurring). Yet the Government omits Justice Douglas's far more relevant conclusion that

> Our inquiry is directed not to the conduct of the Allied Powers but to the conduct of our own officials. . . . *If an American General holds a prisoner, our process can reach him wherever he is. To that extent at least, the Constitution follows the flag. It is no defense for him to say that he acts for the Allied Powers.* He is an American citizen who is performing functions for our government. It is our Constitution which he supports and defends. If there is evasion or violation of its obligations, it is no defense that he acts for another nation. There is at present no group or confederation

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[38] Letter from the Acting Secretary of State, December 14, 1948, Documentary Appendix B, at 110-14, *Hirota v. MacArthur*, 338 U.S. 197 (1949) (Nos. 239, 240, 248).

> to which an official of this Nation owes a higher obligation than he owes to us.[39]

In a case where judicial interference would force the United States to backtrack on an international commitment, or constrain or usurp the authority of another state participant in an international tribunal, stronger foreign policy objections may exist to the assertion of habeas jurisdiction. But Omar and Munaf are being detained by a Green Helmet MNF subject to exclusive U.S. command and control. Maintaining the accountability of American officials in that MNF to the rule of law through American courts poses no similar foreign policy problem. As the House of Lords recognized in analogous circumstances, where, as here, U.S. forces possess the unchecked authority unilaterally to hold or release a U.S. citizen detainee, they can be judicially ordered to exercise that authority without offending any other state participating in the MNF.

C. Under international law, U.N. authorization does not immunize the United States from judicial accountability with respect to the detentions of Omar and Munaf.

Nor, finally, is there any basis under international law for the Solicitor General's claim that the act of U.N. authorization – without meaningful

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[39] *Id.* at 204.

change in U.S. command and control – can nullify a detainee's internationally recognized human right to a judicial evaluation of the lawfulness of his detention. Article 9 (4) of the International Covenant on Civil and Political Rights, to which the United States is a party, declares that "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful." U.S. Ratification of International Covenant on Civil and Political Rights, 58 Fed. Reg. 45934, 45942 (Dep't of State Aug. 31, 1993).

Mere participation in MNF-I operation does not immunize United States personnel from legal responsibility pursuant to their own national judicial accountability mechanisms.[40] Entering the MNF-I did not disable preexisting national judicial accountability mechanisms that apply to Member States' actions within MNF enforcement arrangements. Moreover, even if conducted under U.N. authorization, when U.S. actions violate established human rights norms, such as the norms against torture or detention without judicial review, such actions are *ultra vires*, and

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[40] "In order to continue to contribute to security, the MNF must continue to function under a framework . . . in which the contributing states have responsibility for exercising jurisdiction over their personnel." S/RES/1546. *See also* Dan Sarooshi, INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS 63 (2005) ("The State cannot seek to escape responsibility for its own acts . . . by hiding behind the non-binding decision of an organization.").

cannot be attributable solely to the U.N., leaving the responsible force-contributing State above the law.

This is particularly true when a U.S. citizen is detained in a U.S. military facility under the unchecked and complete control of U.S. armed forces, and the MNF proposes to transfer the U.S. citizen to the jurisdiction of a foreign court that may not fully protect his internationally recognized human rights. Even if this Court were to agree with the Government that the MNF-I is a thoroughly international force, that assumption should equally compel the conclusion that the U.N. lacks authority to give MNF-I power to act contrary to international law. It would be ironic indeed if this Court were to construe MNF-I's mandate under international law to exempt participating U.S. officials from clear international obligations to respect the availability of habeas corpus for detained prisoners.

Justice Douglas, concurring in *Hirota*, prophetically wrote:

> I assume that we have no authority to review the judgment of an international tribunal. But if as a result of unlawful action, one of our Generals holds a prisoner in his custody, the writ of *habeas corpus* can effect a release from that custody. It is the historic function of the writ to examine into the cause of restraint of liberty. *We should not allow that inquiry to be thwarted merely because the jailer acts not only for the United States but for other nations as well. . . .* Tomorrow or next year an American citizen may stand

> condemned in Germany or Japan [or Iraq] by a military court or commission. If no United States court can inquire into the lawfulness of his detention, the military have acquired, contrary to our traditions, a new and alarming hold on us.[41]

CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals in *Omar*, reverse in *Munaf*; and remand both cases to the District Court for further proceedings.

Respectfully submitted,

HAROLD HONGJU KOH
(*Counsel of Record*)
HOPE R. METCALF
RAMZI KASSEM
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS
CLINIC – NATIONAL
LITIGATION PROJECT
YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06510
(203) 432-1660

Counsel for Amici

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[41] *Hirota*, 338 U.S. at 202 (Douglas, J., concurring) (emphasis added).

APPENDIX: QUALIFICATIONS OF AMICI

Madeleine K. Albright served as Permanent Representative to the United Nations from 1993 to 1997 and as U.S. Secretary of State from 1997-2001. Dr. Albright is the first Michael and Virginia Mortara Endowed Professor in the Practice of Diplomacy at the Georgetown School of Foreign Service and the first Distinguished Scholar of the William Davidson Institute at the University of Michigan Business School. Dr. Albright is the Chairman of The National Democratic Institute for International Affairs and also serves on the Board of Directors of the New York Stock Exchange.

Stephen W. Bosworth is Dean of the Fletcher School of Law and Diplomacy at Tufts University. During his diplomatic career, he served as U.S. Ambassador to the Republic of Korea, U.S. Ambassador to the Philippines, U.S. Ambassador to Tunisia, Director of the State Department Policy Planning Staff, Principal Deputy Assistant Secretary for Inter-American Affairs, and Deputy Assistant Secretary for Economic Affairs. He has also served as Executive Director of the Korean Peninsula Energy Development Organization (KEDO) and President of the United States-Japan Foundation.

Jeffrey Davidow is President of the Institute of the Americas at the University of California, San Diego. He served as U.S. Ambassador to Mexico from 1998 to 2002, under both President Clinton and President Bush, and as U.S. Ambassador to Zambia (1988-1990), and Venezuela (1993-1996). From 1996 to 1998, he was Assistant Secretary of

State for Inter-American Affairs. After 34 years in the State Department, he retired with the personal rank of Career Ambassador.

William Durch is a Senior Associate at the Henry L. Stimson Center in Washington. He served as Project Director for the Panel on United Nations Peace Operations in 2000 and Scientific Adviser to the U.S. Defense Threat Reduction Agency in 1999 and 2001. He is the coauthor of The Brahimi Report and the Future of Peace Operations (Stimson, 2003).

Herbert J. Hansell served as the Legal Adviser of the U.S. Department of State from 1977 to 1979, Member of the Permanent Court of Arbitration, The Hague, from 1978-1980, and Senior Adviser and Ambassador to the Mideast Peace Negotiations in 1980. He served as Adviser to the United States Trade Representative on international investment in 1980, and as Adviser to the American Law Institute Restatement of the Foreign Relations Law of the United States. He is also Retired Partner at the law firm of Jones Day.

Karl Inderfurth served as Assistant Secretary of State for South Asian Affairs from 1997 to 2001. He also served as Special Representative of the President and Secretary of State for Global Humanitarian Demining from 1997 to 1998 and U.S. Representative for Special Political Affairs to the United Nations, with ambassadorial rank and Deputy U.S. Representative on the U.N. Security Council from 1993 to 1997. He is the John O. Rankin Professor of the Practice of International Affairs and the Director, Graduate Program in

International Affairs at George Washington University.

Alan Kreczko served as acting Assistant Secretary of State for Population, Refugees and Migration from 2001 to 2002. He also served as Special Assistant to the President and Legal Adviser for the National Security Council from 1993 to 1997 and as Deputy Legal Adviser for the Secretary of State from 1988 to 1993.

James C. O'Brien, a Principal of the Albright Group LLC, served as Special Presidential Envoy for the Balkans from 2000 to 2001, as Principal Deputy Director of the State Department Policy Planning Staff from 1998 to 2000, and as a State Department official from 1989 to 2001.

Thomas R. Pickering served as the Under Secretary of State for Political Affairs from 1997 to 2001, and was the U.S. Ambassador and Permanent Representative to the United Nations from 1989 to 1992. A Career Ambassador, during his diplomatic career, he also served as Assistant Secretary of State for Oceans, Environment and Science, U.S. Ambassador to The Russian Federation, U.S. Ambassador to India, U.S. Ambassador to Israel, U.S. Ambassador to El Salvador, U.S. Ambassador to Nigeria, U.S. Ambassador to The Hashemite Kingdom of Jordan, and Executive Secretary of the Department and Special Assistant to the Secretary. He was also President of the Eurasia Foundation and Senior Vice President for International Relations of The Boeing Company 2001-2005 and is currently Vice Chairman of Hills & Co.

J. Stapleton Roy is Vice Chairman of Kissinger Associates, Inc. A Career Ambassador, he served as U.S. Ambassador to Indonesia, U.S. Ambassador to the Peoples' Republic of China, and U.S. Ambassador to Singapore. He also served as Assistant Secretary of State for Intelligence and Research, Executive Secretary of the Department and Special Assistant to the Secretary, and as Deputy Assistant Secretary for East Asian and Pacific Affairs.

Eric Schwartz served for eight years at the U.S. National Security Council, ultimately heading the White House office responsible for humanitarian and United Nations affairs. A visiting faculty member at Princeton University's Woodrow Wilson School of Public and International Affairs, he was also the UN Secretary General's Deputy Special Envoy for Tsunami Recovery, and in 2003 and 2004, he was the second-ranking official at the Office of the UN High Commissioner for Human Rights. Earlier in his career, he served as a Staff Consultant to the U.S. House of Representatives Foreign Affairs Subcommittee on Asian and Pacific Affairs, and as Washington Director of the human rights organization Asia Watch (now known as Human Rights Watch-Asia). Mr. Schwartz currently serves as Executive Director of the Connect US Fund.

Wendy Sherman a Principal of The Albright Group and former Counselor of the Department of State and Special Advisor to the President and Secretary of State and North Korea Policy Coordinator.

Nancy Soderberg was the Vice-President for Multilateral Affairs at the International Crisis Group, and served as Deputy Assistant to the President for

National Security Affairs and as the U.S. Ambassador and Representative for Special Political Affairs at the United Nations.

Strobe Talbott served as Deputy Secretary of State from 1994-2001, and Ambassador-at-large and Special Advisor to the Secretary of State for the former Soviet Union from 1993-1994.

Frank G. Wisner is Vice Chairman, External Affairs, at American International Group. A career diplomat with the personal rank of Career Ambassador, he previously served as Ambassador to India from 1994-1997. Additionally, he held the positions of Ambassador to Zambia (1979-82), Egypt (1986-91), and the Philippines (1991-92). Mr. Wisner has served in a number of positions in the U.S. government, including Undersecretary of Defense for Policy (1993-94), Undersecretary of State for International Security Affairs (1992-93), Senior Deputy Assistant Secretary for African Affairs (1982-86), and Deputy Executive Secretary of the Department of State (1977). During the course of his career, Frank Wisner served in the Middle East and South and East Asia. Today Mr. Wisner is a member of the Boards of Directors of American Life Insurance Company (ALICO), EOG Resources and Ethan Allen, as well as the boards of numerous non-profit organizations. He is an advisor to Kissinger McClarty Associates.

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In The

Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL., PETITIONERS,

v.

SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR

MOHAMMAD MUNAF, ET AL.

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF HABEAS PETITIONERS

Of Counsel:
PROF. STEPHEN A. SALTZBURG
THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
2000 H STREET, N.W.
WASHINGTON, DC 20052

DANIEL S. FLOYD
Counsel of Record
MELISSA EPSTEIN MILLS
DAVID M. HERZOG
MICHAEL ANTHONY BROWN
MICHAEL J.M. AREINOFF
ANN S. ROBINSON
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel for Amicus Curiae

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

STATEMENT 4

ARGUMENT 13

I. UNITED STATES SERVICEMEMBERS IN IRAQ UNDERTAKE ALL OFFICIAL ACTIONS UNDER OR BY COLOR OF THE AUTHORITY OF THE UNITED STATES 13

A. United States Servicemembers In Iraq Act Pursuant To United States Authority And Report Through A United States Chain Of Command 13

1. The President Has Confirmed That The United States Has Retained Command Of Its Forces In Iraq 14

2. Top United States Commanders Repeatedly Confirm That American Troops In Iraq Are Subject To American Command 16

3. The United States Has Never Ceded To Any International Or

TABLE OF CONTENTS—Continued

Page

Multinational Force The Authority To Command United States Troops In Iraq 21

B. All Lawful Orders Through The United States Chain Of Command Are Promulgated And Obeyed Under The Authority Of The Constitution 25

1. All Orders Lawfully Issued Ultimately Derive From The Constitution 25

2. United States Servicemembers May Not Follow Orders That Contravene The Constitution 28

3. This Duty Of Servicemembers Is Not Abrogated Through Participation In The MNF-I 30

C. Official Actions Of United States Servicemembers, Lawfully Ordered, Are Always Undertaken "Under Or By Color Of Authority Of The United States" 31

II. HIROTA POSES NO BAR TO THE DISTRICT COURT'S JURISDICTION TO ENTERTAIN OMAR'S OR MUNAF'S HABEAS PETITION 32

TABLE OF CONTENTS—Continued

Page

A. Munaf And Omar, Unlike Hirota, Are Citizens Of The United States Being Detained By Their Own Government 33

B. Hirota Does Not Govern Because The Determinations Challenged By Munaf And Omar Are Not Convictions By A Foreign Tribunal 34

CONCLUSION 37

TABLE OF AUTHORITIES

Pages(s)

Cases

Bishop v. Reno,
210 F.3d 1295 (11th Cir. 2000) 36
Burns v. Wilson,
346 U.S. 137 (1953) 31
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333 U.S. 103 (1948) 25
Clinton v. Browning,
292 F.3d 235 (D.C. Cir. 2002) 31
Clinton v. Goldsmith,
526 U.S. 529 (1999) 31
Ex parte Quirin,
317 U.S. 1 (1942) 26
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133 U.S. 258 (1890) 26
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126 S. Ct. 2749 (2006) 26
Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 34, 37
Hirota v. MacArthur,
338 U.S. 197 (1948) ..... passim
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17 F.3d 280 (9th Cir. 1994) 31
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339 U.S. 763 (1950) 34
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508 U.S. 200 (1993) 35
Reid v. Covert,
354 U.S. 1 (1957) 26, 27
United States v. Calley,
48 C.M.R. 19 (1973) 29

TABLE OF AUTHORITIES—Continued

Page(s)

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Statutes

10 U.S.C. § 502(a) 7, 28, 32
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Unif. Code of Mil. Justice §§ 805 & 817 30

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Page(s)

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Major General George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 12 (Aug. 23, 2004).....37
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Page(s)

Terror at the United States Army War College (May 24, 2004).....14
S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003).....5
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To Amend the United Nations Participation Act of 1945, Hearing on H.R. 3085, H.R. 4497, and H.R. 4708 Before the H. Comm. on Foreign Affairs, 81st Cong. 17 (1949).....20
U.N. Gen. Assembly, Int'l Law Comm'n, Responsibility of International Organizations, U.N. Doc. A/CN.4/556 (May 12, 2005).....22
U.S. Senate Armed Services Committee Hearing on the Nomination of Army Lieutenant General David Petraeus to be General and Commander of the Multi-National Forces - Iraq, 2007 WL 172546 (F.D.C.H. Jan. 23, 2007).....19
U.S. Senate Armed Services Committee Hearing on the Nomination of General

TABLE OF AUTHORITIES—Continued

Page(s)

Casey to be Commander of the Multinational Force - Iraq, 2004 WL 1436402 (F.D.C.H. June 24, 2004) 9, 13, 17, 18

U.S. Senate Armed Services Committee Hearing on the Nomination of General Casey to be Commander of the Multinational Force - Iraq, 2007 WL 275562 (F.D.C.H. Feb. 2, 2007) 9, 18, 19

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United States: Administration Policy on Reforming Multilateral Peace Operations, May 1994, 33 I.L.M. 795.....16

Walter Pincus, *U.S. Expects Iraq Prison Growth*, *Wash. Post*, Mar. 14, 2007 10

BRIEF OF THE NATIONAL INSTITUTE OF MILITARY JUSTICE AS AMICUS CURIAE IN SUPPORT OF HABEAS PETITIONERS

INTEREST OF AMICUS CURIAE[1]

The National Institute of Military Justice ("NIMJ") is a nonprofit corporation organized to advance the fair administration of military justice and foster improved understanding of the military justice system. NIMJ regularly appears as amicus curiae in cases raising important issues of military law and policy, including numerous previous appearances before this Court. NIMJ's boards of directors and advisors include law professors, private practitioners, and experts, none of whom is on active duty, but most of whom have served as military lawyers, including several as flag and general officers. Several of NIMJ's directors and advisors have served as part of multinational or coalition forces in Iraq and in previous conflicts.

NIMJ's interest as amicus stems from its fundamental institutional view that American authority always underlies the actions of the

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amicus curiae's intention to file this brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

American military. NIMJ disagrees with the Government's contention that the United States has ceded command authority over its military to an international body or multinational force. In addition, NIMJ believes that the Government's argument pays too little heed to the constitutional role of the President as Commander in Chief of the United States military and Congress's authority to adopt rules and regulations governing the armed forces. Finally, NIMJ maintains that, if the Court adopts the Government's arguments in these cases, the result would be an unacceptable lack of any clear law governing United States servicemembers participating in multinational forces.

SUMMARY OF ARGUMENT

Shawqi Omar and Mohammed Munaf are American citizens who were taken into custody by American servicemembers in Iraq. They continue to be detained aboard an American military base pursuant to orders issued by American military officers through the American chain of command.

The central question in this case is the color of authority under which American servicemembers have acted in effectuating the detention and custody of Omar and Munaf. In a departure from statements previously made by Pentagon officials, the Government here contends that the existence of the Multi-National Force – Iraq ("MNF-I") transforms the official actions of American servicemembers in Iraq into actions undertaken pursuant to an "international authority," rather than actions taken under or by color of United States authority.

Despite its posture in this litigation, the Government has maintained from the inception of its

current involvement in Iraq that United States military forces in Iraq do *not* operate under a distinct legal entity, nor do they answer to any authority apart from the United States chain of command. Rather, the Government has consistently averred that these forces always act pursuant to the unified command of the United States, and to that authority alone. As stated succinctly by the first MNF-I Commanding General in his Senate confirmation hearings: "U.S. forces operate under U.S. command."

Although the United Nations has sanctioned the United States military's presence in Iraq as a member of the MNF-I, this participation in a multinational force does not abrogate the obligations of United States servicemembers, who remain in all circumstances bound to support and defend the Constitution and to follow all lawful orders issued by their chain of command. The United States military in Iraq operates under the sole authority of the United States and is subject to its Constitution, laws, and treaties. Neither the existence of MNF-I nor the sanction of that force by the United Nations transforms or transfers this ultimate source of authority for the United States military in Iraq; the United States retains ultimate command of its own military.

In short, official actions of the United States military in Iraq are taken "under or by color of the authority of the United States," notwithstanding the existence of MNF-I. Accordingly, NIMJ respectfully submits that the District Court has jurisdiction over these habeas corpus petitions.

STATEMENT

The MNF-I

The MNF-I is composed of military personnel from twenty-six countries. *See* Operation Iraqi Freedom, Official Website of Multi-National Force-Iraq, www.mnf-iraq.com. Sixteen of those countries currently have fewer than 100 servicemembers deployed with the MNF-I; five have fewer than ten. *See* Joshua Partlow, *List of 'Willing' U.S. Allies Shrinks Steadily in Iraq*, Wash. Post, Dec. 8, 2007, at A1. Many countries contribute no combat personnel, *see, e.g.*, www.mnf-iraq.com (describing, *inter alia*, the work of Danish forces in initiating Civil Reconstruction projects and the South Korean forces in instituting literacy programs and building community centers), and most do not participate in the detention of prisoners.[2] Estimates suggest that American servicemembers constitute at least 93% of the personnel in the current MNF-I. *See* Partlow, *supra*.

The current Commanding General of the MNF-I, General David Petraeus, is an American military officer, as have been all prior Commanding Generals of the MNF-I. The upper echelons of command in Iraq are populated almost exclusively with United States military personnel.

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[2] Detentions in Iraq are overwhelmingly, if not entirely, undertaken by United States servicemembers. As noted herein, the relevant Task Force involved in the detention and custody of both Omar and Munaf is composed virtually exclusively of American servicemembers.

The MNF-I operates with the permission of the United Nations. *See* S.C. Res. 1511, U.N. Doc. S/RES/1511 (Oct. 16, 2003); S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004). The United Nations Security Council has extended the MNF-I's authorization several times since 2004, most recently through December 2007. *See* S.C. Res. 1723, U.N. Doc. S/RES/1723 (Nov. 28, 2006).

Neither Resolution 1511 nor the resolutions extending its mandate describe a framework for cooperation and coordination among the participating countries. However, in a letter dated June 5, 2004 to the President of the United Nations Security Council, then-Secretary of State Colin Powell wrote: "[T]he MNF must continue to function under a framework that affords the force and its personnel the status that they need to accomplish their mission, and in which the contributing states have responsibility for exercising jurisdiction over their personnel . . . . *The existing framework governing these matters is sufficient for these purposes.*" 07-394 Petitioners' Apppendix [hereinafter "Pet. App."] 87a (emphasis added). That "existing framework" was the Coalition Provisional Authority's Revised Order 17, executed by L. Paul Bremer on June 27, 2004. Section 2, subsection 2 of Order 17 states: "All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States."[3]

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[3] Order 17 was in effect at the time of both Omar's and Munaf's capture and detention. *See* Coalition Provisional

The MNF-I has no unitary Rules of Engagement or general orders to which every servicemember in the MNF-I must adhere. Instead, each member state instructs its own servicemembers as to permissible actions in Iraq, as well as to the limits of their authority. *See* Def. Dep't News Briefing, *available at* 2004 WL 1472829, at *5 (F.D.C.H. July 1, 2004) (statement of Brigadier General David Rodriguez, Deputy Director for Operations, J-3, Joint Staff) [hereinafter "Rodriguez Briefing"] ("[A]ll our allies [in the MNF-I] have a chain of command that goes up to their national leaders, just like we do. For us, all Americans [are] under [the] command and control of American leadership . . . ."). Generally each country accomplishes this task by promulgating, and sharing along its chain of command, country-specific Rules of Engagement.

Such Rules of Engagement are generally classified; however, Japanese legislation deploying Japanese forces to Iraq provides a typical example of the limitations that an MNF-I-participating country may place upon its servicemembers.[4] Per legislative authorization, Japanese servicemembers in Iraq were non-combat troops only, banned from using force except in self-defense and expressly prohibited from participating in detainee operations. *See* Eric

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Authority Revised Order Number 17, § 20 (June 17, 2004) [hereinafter "CPA Order 17"].

[4] At present, all Japanese forces have been withdrawn from Iraq; the Japanese still provide some aircraft and five staff members to the MNF-I. *See*; Operation Iraqi Freedom, Official Website of Multi-National Force – Iraq, www.mnf-iraq.com.

Schmitt, *After the War: The Allies*, N.Y. Times, July 27, 2003, § 1, at 1. Although acting as part of the MNF-I, Japanese servicemembers could not follow orders given by any MNF-I personnel that conflicted with their national mandate. The ultimate authority as to the extent of participation of Japanese servicemembers remained with Japan; neither the United States nor any international body or force could overrule these limitations. *Cf.* Rodriguez Briefing, 2004 WL 1472829, at *5 ("All allies, for example, can decline to participate in an operation sometimes, just like they have different ROEs sometimes and that, because that comes to their national leadership.").

Similarly, the United States military promulgated Rules of Engagement to direct its servicemembers deployed as part of the MNF-I. These Rules of Engagement, along with the United States Constitution, laws, and treaties, and the laws of war, set forth the permissible boundaries of actions undertaken by United States servicemembers in Iraq. *Cf.* 10 U.S.C. § 502(a) (enlistment oath); 10 U.S.C. § 892 (making failure to obey a lawful order or regulation a punishable offense); Joint Service Committee on Military Justice, *Manual for Courts Martial United States*, pt. IV, ¶ 16.c.(1)(c) (2008 ed.) (defining a lawful general order or regulation).

Accordingly, the MNF-I is *not* a legally distinct force with its own independent authority, as the Government argues. *See, e.g.*, Brief for the Federal Parties [hereinafter "Gov't Br."] 2 ("[T]he MNF-I operates under the 'unified command' of United States military officers, but it is legally distinct from the United States military . . . ." (citation omitted)).

Rather the MNF-I is a functional cooperative, consisting of the autonomous individual military units of participating countries. This means that a United States servicemember in the MNF-I might be obligated to follow a command that a servicemember from, for example, Japan, though serving beside him, would not and could not obey. This is true even though both individuals might, as the Government stresses, be wearing the insignia of the MNF-I. By the same token, a United States servicemember would not, and could not, follow an order from an MNF-I superior officer if that order were inconsistent with the United States Rules of Engagement or with the orders issued by the United States chain of command. Although loosely confederated under an MNF-I umbrella, each country's military retains its independence with regard to what actions its servicemembers may undertake.

The ultimate military autonomy of each participating country, including the United States, is underscored and reinforced by the statements of United States and MNF-I leadership at the highest levels of command. General George W. Casey, U.S. Army, seeking to allay Congressional concerns about the chain of command in the MNF-I, assured the Congress in written testimony that United States servicemembers in Iraq are "subject to the authority, direction, and control of the Commander, U.S. Central Command." U.S. Senate Committee on Armed Forces, Advance Questions for General George W. Casey, Jr., U.S. Army Nominee for Commander, Multi-National Force – Iraq (June 2004), *available at* http://armed-services.senate.gov/statemnt/2004/June/Casey.pdf. Shortly thereafter, General Casey acknowledged that

United States servicemembers do not answer to any component of the United Nations or to any entity other than the United States. U.S. Senate Armed Services Committee Hearing on the Nomination of General Casey to be Commander of the Multinational Force - Iraq, *available at* 2004 WL 1436402, at *34 (F.D.C.H. June 24, 2004) (testimony of General George Casey Jr.) [hereinafter "Casey Testimony 2004"].

In 2007, after having commanded the MNF-I for more than two years, General Casey again testified that "[t]here is a parallel chain of command [in Iraq] . . . [with] U.S. forces operat[ing] under U.S. command." U.S. Senate Armed Services Committee Hearing on the Nomination of General Casey to be Commander of the Multinational Force - Iraq, *available at* 2007 WL 275562, at *57 (F.D.C.H. Feb. 2, 2007) (testimony of General George Casey) [hereinafter "Casey Testimony 2007"]. This is consistent with United States participation in previous multinational military operations. The practice reinforces the President's role as Commander in Chief of all American forces, whether or not they are engaged in a multinational force, and recognizes Congress's power to adopt rules and regulations to govern the military.

American Detention Facilities in Iraq

According to military and Congressional officials, Camp Cropper — where Omar and Munaf are presently detained — is "run by the United States military and guarded by the United States military police." Douglas Jehl, *The Struggle for Iraq: Prisoners*, N.Y. Times, May 17, 2004, at A1. Task Force 134, the American military unit in Iraq "charged with detainee command and control," is

responsible for running detention operations at Camp Cropper. Navy Senior Chief Jon McMillan, *Navy's JAG visits Baghdad, observes trials*, March 13, 2007, http://www.mnf-iraq.com/index.php?option=com_content&task=view&id=10579&Itemid=128; *see also* Thom Shanker, *With Troop Rise, Iraqi Detainees Soar in Number*, N.Y. Times, Aug. 25, 2007, at A1.

For decision-making purposes, Task Force 134 is composed entirely of American servicemembers. The Commanding General of Task Force 134 is an American officer reporting directly to General Petraeus. The Deputy Commanding Officer for Detainee Operations is also an American servicemember, as are Task Force 134's legal advisor, spokesman, military police unit, military legal support unit, and the head of detainee operations at Camp Cropper. United States military authority over Task Force 134 and the detainee operations at Camp Cropper is plenary.[5]

In these consolidated cases, the Government has never denied this plenary authority. Nor has the

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[5] For instance, the United States military is the contracting authority for provision of food and other logistical services to detainees and guards at these facilities. *See, e.g.*, Department of Defense Contract No. DAAA09-02-D-0007, Dec. 14, 2001 (awarding the Logistics Civil Augmentation Program ("LOGCAP") contract to KBR), Task Order 139 (covering logistical services at Camp Cropper and other bases); *see also* Walter Pincus, *U.S. Expects Iraq Prison Growth*, Wash. Post, Mar. 14, 2007, at A10. Such facts illustrate that the United States military makes all relevant decisions, large and small, with regard to the management of Camp Cropper's detention facilities.

Government contended that it lacks the ability to release Munaf and Omar, or that it would require the consent of other countries or the United Nations to do so. Indeed, it has provided evidence suggesting the contrary. *See* Joint Appendix [hereinafter "J.A."] 44 (Declaration of John D. Gardner) ("U.S. authorities indicated no objection to Iraqi plans to prosecute Mr. Munaf in the [Central Criminal Court of Iraq]."") (emphasis added); 07-394 Pet. App. 104a (Declaration of John D. Gardner) (same regarding plans to prosecute Omar); *see also generally* Rodriguez Briefing, 2004 WL 1472829, at *5 (describing the MNF-I as a "cooperation between allies" in which "there's not anything like veto authority").

Involvement of United States Servicemembers with the Detention of Munaf and Omar

Without unnecessarily repeating the facts set forth in the parties' briefs, it is imperative to emphasize that United States servicemembers instigated the capture of Munaf and Omar, authorized and oversaw their continued detention, and have maintained exclusive custody of Munaf and Omar from the date of their capture to the present.[6]

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[6] According to the Pentagon, detainees in the Abu Ghraib prison were "in U.S. custody." U.S. Senate Armed Services Committee Hearing on Treatment of Iraqi Prisoners, *available at* 2004 WL 1027359, at *5. (F.D.C.H. May 7, 2004) (testimony of Donald H. Rumsfeld, U.S. Secretary of Defense). Like Camp Cropper, Abu Ghraib was a functioning detention center commanded and operated by the U.S. military. Detainee operations at Abu Ghraib have since ceased with detainees transferred to Camp Cropper.

The story of Munaf and Omar's detention is one of solely American actors.

In October 2004, United States servicemembers arrested Omar in his Baghdad home, J.A. 111; approximately seven months later, in May 2005, United States servicemembers seized and arrested Munaf in Baghdad, J.A. 33. Following these arrests, United States servicemembers oversaw the transfer of Omar and Munaf to United States detention facilities at Camps Bucca and Cropper. J.A. 31-33; J.A. 111-12. Since their arrests, both Munaf and Omar have been detained by United States servicemembers and kept exclusively in United States custody. *Id.* Each of the detention facilities in which Munaf and Omar have been held is operated by Task Force 134, an American military unit under the exclusive command of United States military officers and reporting to General Petraeus through an American chain of command. *See* McMillan, *supra*.

Not only have Munaf and Omar been detained and held in continuous custody by United States servicemembers, but those servicemembers have played integral roles in maintaining or justifying their detentions. The three-member panels that designated Munaf a "security internee" and Omar a "security internee" and "enemy combatant" consisted exclusively of United States servicemembers. Oral Arg. Tr. 31-32, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sept. 11, 2006). In Munaf's case, United States servicemembers transferred Munaf to the Central Criminal Court of Iraq for trial, J.A. 44, 47, 61; in Omar's case, United States servicemembers indicated that they were willing to so transfer him, J.A. 132-33. In neither case is there any indication

that these decisions were cleared through non-United States military personnel. At every step of the detention process, United States servicemembers, acting under orders, have held the actual and constructive keys to Munaf's and Omar's cells.

ARGUMENT

I. UNITED STATES SERVICEMEMBERS IN IRAQ UNDERTAKE ALL OFFICIAL ACTIONS UNDER OR BY COLOR OF THE AUTHORITY OF THE UNITED STATES

A. United States Servicemembers In Iraq Act Pursuant To United States Authority And Report Through A United States Chain Of Command

The United States servicemembers deployed in Iraq who were ordered to seize and detain Munaf and Omar received that order through the United States chain of command. This chain of command begins with the President, the Commander in Chief of the United States armed forces, and continues through the Secretary of Defense and the Commanding General of the MNF-I. *See* Casey Testimony 2004, 2004 WL 1436402, at *34.

By contrast, the MNF-I has no legal authority to issue orders to United States servicemembers, except to the extent that those orders are ratified by the United States chain of command. The mere existence of the MNF-I does not convert the solely American authority under which American servicemembers in Iraq act into authority derived from a multinational source. To the contrary, the United States servicemembers ordered to detain

Munaf and Omar undertook that custody — as they undertake all official actions — "under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1) (2006).

1. The President Has Confirmed That The United States Has Retained Command Of Its Forces In Iraq

President George W. Bush, the Commander in Chief of the United States armed forces, has stated that American military forces in Iraq "operate *under American command* as part of a multinational force." President George W. Bush, Remarks by the President on Iraq and the War on Terror at the United States Army War College (May 24, 2004) (emphasis added). A month prior to the creation of the MNF-I, President Bush asserted his intent that the authority of the United States chain of command over its military operations in Iraq would remain absolute: "Commander, USCENTCOM, under the authority, direction, and control of the Secretary of Defense, shall continue to be responsible for U.S. efforts with respect to security and military operations in Iraq." National Security Presidential Directive 36 (May 11, 2004), *available at* http://www.fas.org/irp/offdocs/nspd/ nspd051104.pdf.

The Government's position in this case fails to appreciate the important distinction between *command*, which the United States has affirmatively retained, and *operational control*, which the United States appears to have retained but which is ultimately irrelevant to this case. A 1994 Presidential Decision Directive distinguished these concepts as follows:

No President has ever relinquished command over U.S. forces. Command constitutes the authority to issue orders covering every aspect of military operations and administration. The sole source of legitimacy for U.S. commanders originates from the U.S. Constitution, federal law and the Uniform Code of Military Justice and flows from the President to the lowest U.S. commander in the field. The chain of command from the President to the lowest U.S. commander in the field remains inviolate.

***

Operational control is a subset of command. It is given for a specific time frame or mission and includes the authority to assign tasks to U.S. forces already deployed by the President, and assign tasks to U.S. units led by U.S. officers. Within the limits of operational control, a foreign UN commander cannot: change the mission or deploy U.S. forces outside the area of responsibility agreed to by the President, separate units, divide their supplies, administer discipline, promote anyone, or change their internal organization.

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If it is to our advantage to place U.S. forces under the operational control of a

> UN commander, the fundamental elements of U.S. command still apply.

United States: Administration Policy on Reforming Multilateral Peace Operations, May 1994, 33 I.L.M. 795.

Whether or not the United States has ceded operational control over its forces in Iraq to MNF-I, it has retained command of those forces.

2. Top United States Commanders Repeatedly Confirm That American Troops In Iraq Are Subject To American Command

From the beginning of the current action in Iraq, American military leaders have recognized that the American chain of command governs American forces. The Commanders of the MNF-I have repeatedly confirmed during public hearings before the United States Congress that American servicemembers operate under the authority of the United States, notwithstanding the multinational nature of the operational force in Iraq.

At his confirmation hearing before the Senate Armed Services Committee prior to assuming his duties as the first Commander of the MNF-I, General Casey unequivocally stated that American forces operate exclusively under American command:

> [SENATOR LEVIN:] Will U.S. forces at any level be under the command of any other commander but a U.S. commander?

CASEY: No, Senator, they will not.

Casey Testimony 2004, 2004 WL 1436402, at *9.[7]

General Casey further testified that the chain of command for American servicemembers flows from the President through the Secretary of Defense. While General Casey's command "was specifically established really by the United Nations resolutions," *id.* at 34, Casey was clear that his authority derived from the United States and not from the United Nations or any other source of authority:

> WARNER: [W]hat reporting chain do you have, if any, up through your command to the United Nations.
>
> CASEY: Senator, I know of no reporting chain that goes back to the United Nations. . . . If that changes, I'll come back to you.
>
> WARNER: And just provide it in today's record at the earliest possible time because I think that's very important. . . . And reporting up and what directions,

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[7] By this interrogation of General Casey, Congress assured itself of the intentions of the President and his chain of command. Had it not been convinced that the United States would be in complete control of its own military, Congress might well have exercised its legislative function to ensure that the United States did not cede authority to the United Nations or a multinational force. Throughout the history of the United States, the executive and legislative branches have been consistent in preserving United States control over United States forces.

> if any, could they send down to you in your capacity as commander.
>
> CASEY: Yes. All right, Senator, I understand. But . . . my chain of command is through the secretary of defense and the [P]resident.

Id. at 34.

Two and a half years later, General Casey was again before the Senate Armed Services Committee prior to his confirmation as United States Army Chief of Staff. His answers at that time reflected the Pentagon's consistent position — and the facts on the ground — that American servicemembers in Iraq were operating under the authority of the United States:

> [GENERAL CASEY:] There is a parallel chain of command. And as you know better than anyone, U.S. forces operate under U.S. command.

Casey Testimony 2007, 2007 WL 275562, at *57.

Under specific questioning from Senator Warner, General Casey confirmed unified American command and the accountability of United States servicemembers to the American chain of command:

> WARNER: Well, heretofore we've had a unified command of the American structure and you're assuring me that that has not been changed?
>
> CASEY: Absolutely has not changed.
>
> WARNER: The American G.I. is accountable for the orders he gets from

> American chain of command right up to your successor, is that correct?
>
> CASEY: That's correct, Senator.

Id. at 58.

General Casey's successor as Commander of MNF-I, General David Petraeus, likewise affirmed in 2007 that American troops are under the command (as well as the operational control) of the United States military:

> LEVIN: Who will have the operational and tactical control of U.S. battalions that are partnered with the nine Iraqi brigades in the nine sectors of Baghdad?
>
> PETRAEUS: U.S. commanders, sir.

U.S. Senate Armed Services Committee Hearing on the Nomination of Army Lieutenant General David Petraeus to be General and Commander of the Multi-National Forces - Iraq, *available at* 2007 WL 172546, at *11 (F.D.C.H. Jan. 23, 2007) (testimony of Lieutenant General David Petraeus).

It is clear from this testimony and that of other representatives of the United States Government — most notably the State Department, which maintained the position consistently from the inception of the United Nations in the mid-twentieth century through 2007[8] — that the orders given to

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[8] *See, e.g.*, House Armed Services Committee, Subcommittee on Oversight and Investigations Hearing on Development of Iraqi Security Forces, *available at* 2007 WL 1701722, at *34 (F.D.C.H. June 12, 2007) (testimony of Deputy Assistant Defense Secretary for Near Eastern and South Asian Affairs

United States servicemembers in Iraq to detain United States citizens derive solely from the United States chain of command, even when those servicemembers are part of the MNF-I. The Government conceded this point at oral argument before the Court of Appeals. *See* Oral Arg. Tr. 12, *Omar v. Harvey*, No. 06-5126 (D.C. Cir. Sep. 11, 2006) ("[The Court:] The Government agrees with the District Court that Omar is in the authority and control of the United States. Is that right?" [Counsel for the Government]: It is, Your Honor . . . .").

This unified and consistent American chain of command under which American servicemembers operate in Iraq belies the Government's current

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Mark Kimmett) ("[T]he chain of command goes from Multi-National Forces-Iraq through Central Command to the Department of Defense and the joint staff."); U.S. Senate Committee on Foreign Relations Hearing on Iraq Transition (Part II), *available at* 2004 WL 865477, at *13 (F.D.C.H. Apr. 22, 2004) (testimony of Marc Grossman, Undersecretary Of State For Political Affairs) ("There have also been questions about the command and control of U.S. forces in Iraq after June 30, and I can tell you that U.S. forces in Iraq will report to the U.S. commander of the [MNF-I, who] will report to the [P]resident through the military chain of command."); To Amend the United Nations Participation Act of 1945, Hearing on H.R. 3085, H.R. 4497, and H.R. 4708 Before the H. Comm. on Foreign Affairs, 81st Cong. 17 (1949) (testimony of Ernest A. Gross, Assistant Secretary of State) ("[U]nder the Constitution, America military personnel cannot be made available to foreign powers or foreign organizations, except by authority of law, [thus] it has been necessary, instead of detailing the personnel to the United Nations . . . to keep them within American control.").

position that American servicemembers are acting "under or by color of" an "international authority" when following orders to detain Munaf and Omar. *Cf.* Gov't Br. 22 ("Omar and Munaf are being held by a multinational force abroad pursuant to international authority."). Such ultimate "international authority" over United States servicemembers simply does not exist.

3. The United States Has Never Ceded To Any International Or Multinational Force The Authority To Command United States Troops In Iraq

The Government argues that "the key" to the jurisdictional determination in these cases "is that the American forces that command and in part comprise the MNF-I are not operating solely under the United States authority, but rather 'as the agent of' a multinational force that was established by and operates pursuant to international authority." Gov't Br. 23. For this proposition, the Government repeatedly cites U.N. Security Council Resolution 1546 and letters from the Iraqi government to the U.N. Security Council requesting that the Security Council renew the MNF-I's mandate under Resolution 1546. *See* 07-394 Pet. App. 89a-94a, 95a-97a. However, an examination of these documents reveals that, while the MNF-I was sanctioned by the U.N. and coalition countries, those bodies do not have independent authority to command United States servicemembers.

Nowhere in the United Nations Resolutions, nor in any other United Nations documents, does the United Nations provide Rules of Engagement to govern MNF-I or United States forces. Furthermore,

nowhere do individual countries electing to participate in the MNF-I agree to subordinate their national chains of command to a distinct international or multinational entity; certainly the United States made no such concession. *Cf.* Rodriguez Briefing, 2004 WL 1472829, at *5 ("[A]ll our allies [in the MNF-I] have a chain of command that goes up to their national leaders, just like we do. For us, all Americans [are] under [the] command and control of American leadership, of U.S. leadership. . . .").

The Government's "international authority" theory confuses international sanction of United States military involvement overseas with ceding to an international body the power and authority to command United States servicemembers. While the U.N. (by resolution) and the Iraqi government (by request) undoubtedly consented to the presence in Iraq of United States forces operating under certain specified conditions, the United States never relinquished its authority over its armed forces, and neither the U.N. nor any other body had or has the power to command United States forces.[9] That authority remains in the hands of the United States chain of command.

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[9] Indeed, the United Nations expressly disclaims responsibility for acts committed by troops operating pursuant to its authorizations when those troops remain under the "operational command" of their home countries. *See, e.g.*, The Secretary-General, Report of the Secretary-General on the Financing of United Nations Peacekeeping Operations, ¶ 17, U.N. Doc. A/51/389 (Sept. 20, 1996); U.N. Gen. Assembly, Int'l Law Comm'n, Responsibility of International Organizations, at 63, U.N. Doc. A/CN.4/556 (May 12, 2005).

United Nations documents pre-dating Resolution 1546 buttress this contention. For instance, under the Coalition Provisional Authority's Revised Order 17, service members participating in the MNF-I are subject to the jurisdiction of their home courts and *only* the jurisdiction of their home courts. *See* CPA Order 17, § 2(2) ("All MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States.").

The Government claims that "if the United States courts were to assume authority [over the habeas petitions of Omar and Munaf], there is no reason why the courts of other nations could not do so, potentially subjecting decisions of multinational bodies like the MNF-I . . . to review and inconsistent judgments in multiple fora worldwide." Gov't Br. 26. But Order 17 clearly anticipated and addressed such concerns. Contrary to the Government's assertions, the United States Courts' exercise of jurisdiction over cases in which individuals are held in custody by United States servicemembers would have no practical or legal consequence not already contemplated under Order 17.[10]

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[10] Components of the MNF-I are, in fact, already subject to inconsistent laws governing their conduct. For example, the United States military engages in conduct prohibited by Japan to its military; thus, a United States servicemember could be prosecuted in the United States for refusing to do what a Japanese servicemember could be prosecuted in Japan for doing. If an American court were to hold that the Constitution or laws of the United States prohibited or required certain actions, its decision would have no impact on that which servicemembers from other countries could do. This is implicit

Finally, the Gardner Declarations, heavily relied upon by the Government, state that "U.S. authorities indicated no objection to [an] Iraqi plan[] to prosecute" Omar or Munaf. J.A. 44; 07-394 Pet. App. 104a. At oral argument before the Court of Appeals in *Omar*, the Government confirmed that "in response to [a] multi-national force request to have [Omar] tried in the Central Court of Iraq, the U.S. could have said no." Oral Arg. Tr. 25-26, *Omar v. Harvey,* No. 06-5126 (D.C. Cir. Sept. 11, 2006). Both statements indicate that United States authority in Iraq was not subsumed under international authority; rather, the United States retained full autonomy to command its military to retain custody of detainees.[11] At all times, Munaf and Omar have been detained under orders coming directly through the United States chain of command.

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in the structure of the MNF-I. Indeed, if the United States did not retain jurisdiction over its servicemembers in Iraq, the result would be an unacceptable absence of clear law governing their actions.

11 Not only does the Government make no claim that it lacks the power to release Munaf and Omar, but any such claim would raise serious questions under the Constitution. The Government's argument suggests that the United Nations could, if it chose, supersede the President's authority as Commander in Chief and Congress's authority with respect to the American military. But there is no precedent for the United Nations, which itself has no sovereign power, to override the constitutionally allocated power of the President and Congress.

B. All Lawful Orders Through The United States Chain Of Command Are Promulgated And Obeyed Under The Authority Of The Constitution

1. All Orders Lawfully Issued Ultimately Derive From The Constitution

The power of the President to command United States military forces is conferred by Article II of the United States Constitution. U.S. Const. art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."); *see also Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 109 (1948) ("The President also possesses in his own right certain powers conferred by the Constitution on him as Commander-in-Chief.).

Likewise, Congress has constitutional powers over military action. Congress funds the military and "make[s] Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. These rules include the Uniform Code of Military Justice and other laws that govern United States personnel at home and abroad.

Not only do the President's power to command the military and Congress's power to make rules governing the military flow directly from the Constitution; the Constitution is also the ultimate constraint upon the actions of the President, including in his role as Commander in Chief, and upon congressional lawmaking. *See* U.S. Const. art. VI ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land . . . ."). *Cf. Ex parte Quirin*, 317 U.S. 1, 25-26 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution."), *quoted in Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006).

In recognition of these constraints, this Court has long held that no action by any branch of the United States Government, including by the President acting as Commander in Chief, may be undertaken if it conflicts with the fundamental requirements of the Constitution. *See, e.g., Reid v. Covert*, 354 U.S. 1, 16 (1957) (plurality opinion) ("[N]o agreement with a foreign country can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution."); *Quirin*, 317 U.S. at 25 (affirming the power of the courts to set aside an action taken by the President as Commander in Chief when the courts possess "the clear conviction that [the presidential action is] in conflict with the Constitution or laws of Congress constitutionally enacted"); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States.") The President — even acting at the apex of his power to command the military — may not lawfully order servicemembers to take any actions forbidden by the Constitution.

While the President controls the military power of the United States, that control is not absolute. "Even though 'theater of war' be an expanding

concept," the President's orders are constrained by the Constitution. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (upholding "faithfulness to our constitutional system" by rejecting government's argument that the President's military power as Commander in Chief of the Armed Forces gives the President "broad powers" beyond those authorized by the Constitution). As Justice Black explained half a century ago:

> [W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government. It was recognized long before Paul successfully invoked his right as a Roman citizen to be tried in strict accordance with Roman law.

Reid, 354 U.S. at 5-6 (plurality opinion).

No subordinate officer in the United States chain of command could lawfully issue an order which his superior, the President and Commander in Chief, could not. Thus it is beyond doubt that neither the President nor any United States military officer

could lawfully order any servicemember to undertake any action contrary to the Constitution.

2. United States Servicemembers May Not Follow Orders That Contravene The Constitution

Every individual who enlists in the United States armed forces must take an oath:

> I, _____, do solemnly swear (or affirm) that I will *support and defend the Constitution* of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will *obey the orders of the President of the United States and the orders of the officers appointed over me*, according to regulations and the Uniform Code of Military Justice. So help me God.

10 U.S.C. § 502(a) (emphasis added).[12] From their first day in the military, United States servicemembers are trained to follow orders in accordance with this oath. The military carefully distinguishes between lawful orders and unlawful orders. Servicemembers have a legal duty to follow all lawful orders; they also have a corollary legal duty to disobey any unlawful orders. A servicemember violating either duty is subject to trial by court-martial. *See* 10 U.S.C. §892; *see also*

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[12] The President of the United States takes a similar oath to the Constitution upon taking office, promising to "preserve, protect and defend the Constitution of the United States." U.S. Const. art. II, § 1, cl. 8.

United States v. Stanley, 483 U.S. 669, 703 n.26 (1987) (Brennan, J., concurring in part and dissenting in part) (citing *United States v. Calley*, 48 C.M.R. 19 (1973) (obedience to orders no defense where defendant should have known that order to kill civilians was illegal) and *United States v. Kinder*, 14 C.M.R. 742 (1954) (obedience to orders no defense for soldier who executed order to shoot subdued prisoner at South Korean air base)).

Whether an order is lawful is constrained by the Constitution, federal law, and the authority of the issuing officer. In short, "[a] general order or regulation is lawful unless it is contrary to the Constitution, the laws of the United States, or lawful superior orders or for some other reason is beyond the authority of the official issuing it." *Manual for Courts-Martial United States*, pt. IV, ¶ 16.c.(1)(c) (2008 ed.).

As a United States servicemember faces grave consequences for failing to follow a lawful order or wrongfully following an unlawful one, it is incumbent upon every commanding officer to ensure that subordinates know and understand the applicable Rules of Engagement. Furthermore, superior officers must ensure that their subordinate United States servicemembers understand their obligations under the Constitution, the laws of the United States, and the laws of war. The United States military provides training at all stages of a servicemember's career (from basic training to pre-deployment training to continuing military education) on the contours of these obligations.

3. This Duty Of Servicemembers Is Not Abrogated Through Participation In The MNF-I

The United States has not subordinated its military to the control or authority of a multinational force in Iraq. Even were it to do so, the actions of United States servicemembers taking part in such a force would still be subject to all orders consistent with the Constitution and laws of the United States and the limits to which the President had shared military control with that multinational force. Official actions undertaken by United States servicemembers are always under United States authority.

Any contrary position would not only threaten our deeply held constitutional values, but would undermine the national autonomy of our military. No matter the circumstance, American servicemembers remain subject to their oath to support and defend the laws and Constitution of the United States and to follow all, and only, lawful orders.

The extensive reach of the Constitution, laws, and authority of the United States also manifests itself in the broad power of courts-martial. United States courts-martial may be convened anywhere in the world, and they have jurisdiction over every United States servicemember. *See* Unif. Code of Mil. Justice §§ 805 ("This chapter applies in all places."), 817 (granting jurisdiction over all servicemembers). This power of courts-martial over United States servicemembers is in no way abrogated by the participation of United States forces in the MNF-I. All United States courts-martial, wherever they may be convened, remain subject to the habeas

jurisdiction of federal courts. *See, e.g., Clinton v. Goldsmith*, 526 U.S. 529, 538 n.11 (1999); *Burns v. Wilson*, 346 U.S. 137, 142 (1953). No matter the circumstances, United States servicemembers deployed abroad remain subject to the Constitution, laws, and authority of the United States.

C. Official Actions Of United States Servicemembers, Lawfully Ordered, Are Always Undertaken "Under Or By Color Of Authority Of The United States"

United States servicemembers following orders in the course of their service always act under or by color of the authority of the United States. Action "under color of" authority is the use of power "possessed by virtue of" the authority and "made possible only because the [actor] is clothed with the authority." *See United States v. Classic*, 313 U.S. 299, 326 (1941) (defining action "under color of" state law); *see also Clinton v. Browning*, 292 F.3d 235, 250 (D.C. Cir. 2002) (applying same definition to federal government action); *Jackson v. Brigle*, 17 F.3d 280, 284 (9th Cir. 1994) (reasoning that military law enforcement officers' following the order of a superior officer was action under color of their authority as servicemembers).

United States servicemembers not only hold the keys to these men's cells — but the United States military also owns, staffs, and operates the camps in which those cells are located. Further, that military has issued all of the orders relating to their detentions. The authority underlying these orders is the United States chain of command in Iraq. The orders are promulgated "under or by color of" the twin authorities to which a servicemember swears an oath to bear true allegiance and obey: the

Constitution of the United States; and the President of the United States and the officers appointed over the servicemember. *Cf.* 10 U.S.C. § 502(a). Munaf and Omar indisputably are in custody "under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1).

II. HIROTA POSES NO BAR TO THE DISTRICT COURT'S JURISDICTION TO ENTERTAIN OMAR'S OR MUNAF'S HABEAS PETITION

The Government does not dispute that Munaf and Omar are in the custody of the United States military. *See* Gov't Br. 5 ("Since his capture, Omar has remained in the custody of members of the United States armed forces operating as part of the MNF-I."), 13 ("Omar and Munaf are held overseas . . . by United States forces acting as part of a multinational force."). Instead, the Government argues that that "United States courts lack jurisdiction to review the detention of individuals held abroad pursuant to international authority, including individuals held by United States forces acting as part of a multinational force." *Id.* at 17. For this proposition, the Government relies on *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam).

The Government's brief makes clear that it believes application of the supposed "rule of *Hirota*" to these petitions rests upon the premise that the United States military forces that captured and currently maintain custody of Omar and Munaf did so "pursuant to *international authority*." *See, e.g.*, Gov't Br. 21 ("Here, as in *Hirota*, the habeas petitioners are in the physical custody of United States military officers, but those officers are acting

as part of a multi-national force under international authority."), 31 ("[T]he critical focus in Hirota was on the source of detention authority."). Indeed, the Government argues that "the key [to the jurisdictional issue] is that the American forces that command and in part comprise the MNF-I are not operating solely under the United States authority, but rather 'as the agent of' a multinational force that was established by and operates pursuant to international authority." *Id.* at 23.

Neither the Government's excessively broad interpretation of *Hirota* nor the premise underlying the argued application of that case to these petitions survives scrutiny. The *Hirota* decision made clear that when a particular constellation of circumstances align, this Court lacks jurisdiction to entertain the proffered habeas petition. 338 U.S. 197. But as the Court of Appeals noted below, "*Hirota* nowhere explains which 'circumstances' were controlling." *Omar*, 479 F.3d at 7. Nevertheless, four fundamental and insurmountable differences between *Hirota* and the instant cases — namely, the applicants' citizenship, the absence of a challenge to a foreign criminal judgment, the composition of the relevant tribunal, and the nature of its determination — demonstrate that the circumstances compelling the decision in *Hirota* simply are not present here.

A. Munaf And Omar, Unlike Hirota, Are Citizens Of The United States Being Detained By Their Own Government

Kōki Hirota, the would-be petitioner in *Hirota*, was a Japanese citizen. *Hirota*, 338 U.S. at 198. By contrast, Munaf and Omar are both United States citizens.

Munaf and Omar's citizenship alone makes *Hirota*'s application to these cases questionable at best. As Munaf persuasively argued in his certiorari petition, decisions of this Court extending from *Johnson v. Eisentrager*, 339 U.S. 763 (1950) — handed down just two years after *Hirota* — to *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), have consistently affirmed that "United States citizens enjoy . . . greater protection than enemy aliens when they find themselves imprisoned abroad by their government." Petition for Writ of Certiorari 12, *Munaf v. Geren*, No. 06-1666.

B. Hirota Does Not Govern Because The Determinations Challenged By Munaf And Omar Are Not Convictions By A Foreign Tribunal

Contrary to the Government's claim that *Hirota* "focused on the source of authority pursuant to which the petitioners were being held," Gov't Br. 19, the *Hirota* Court specified the grounds for its decision quite clearly: it lacked the "power to grant the relief prayed" because it had "no authority to review, affirm, set aside or annul the judgments and sentences" of the international military tribunal imposing the judgment and sentence on the would-be petitioner. 338 U.S. at 198. The "crucial point" in the *Hirota* Court's view was not, as the Government claims, that "when General MacArthur established the relevant tribunal, he was 'acting as' the Commander and agent of the Allied Powers"; rather, the crucial point was that the military tribunal that sentenced Hirota was "not a tribunal of the United States." *Id.* In other words, despite Hirota's allegations that he was "not asking this court to review the decision of an international court," Brief

for Petitioner at 14, *Hirota v. MacArthur*, 338 U.S. 197 (1948) (No. 239, Misc.), this Court viewed his habeas petition as seeking precisely that: a collateral attack on his foreign conviction.

Neither Omar nor Munaf, by contrast, seeks to challenge a foreign conviction; indeed, neither is being held on the basis of any such conviction. Rather, both are being held as "security internees" on suspicion of criminal activity in Iraq pursuant to the determination of a panel made up of three United States military officers.[13] *See Omar v. Harvey*, 479 F.3d 1, 3 (D.C. Cir. 2007) ("Following Omar's arrest, an MNF-I panel of three American military officers conducted a hearing to resolve his status."); Gov't Br. 22 (arguing that Omar and Munaf "are like thousands of other security internees held by the MNF-I"). Thus, the Government is simply wrong that "the habeas petitioners in these cases ask the United States courts to review decisions made . . . by the MNF-I *or the Iraqi government*." Gov't Br. 27 (emphasis added). The only decisions relevant to Omar's and Munaf's challenged detentions are those

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[13] While Munaf is allegedly being detained following a conviction in the CCCI, the Government admits that he is also being held for the independent reason that he was designated a "security internee." *See* Gov't Br. 22. In any case, Munaf's petition was filed, as the Government acknowledges, "before his trial and conviction by the CCCI." *Id.* at 10. And the Government itself points out the "longstanding principle that the jurisdiction of the Court depends upon the state of things at the time of the action brought." *Id.* at 29 (quoting *Keene Corp. v. United States*, 508 U.S. 200, 207 (1993)) (internal quotation marks omitted). Consequently, Munaf's purported conviction in the CCCI is irrelevant to this Court's jurisdictional inquiry.

in which the three-person panels of American military officers determined that Omar and Munaf were "security internees."[14]

Even a brief examination of the military tribunal at issue in *Hirota* illuminates its fundamentally different character. The International Military Tribunal for the Far East ("IMTFE") was presided over by judges nominated by each country represented in the Far East Commission, including the nine signatories to the instrument of Japan's surrender. *See Hirota*, 338 U.S. at 207 (Douglas, J., concurring). The Australian nominee served as IMTFE's president; about half of the attorneys working under him were from countries other than the United States; and decisions about whom to indict were made by a committee chaired by a British barrister. Arnold C. Brackman, *The Other Nuremberg: The Untold Story Of The Tokyo War Crimes Trials* 54-64, 76 (1987).

By contrast, the three-person panels which declared Omar and Munaf to be "security internees" were made up exclusively of American military officers. *See Omar*, 479 F.3d at 3. The Gardner Declarations and the Government's brief to this Court elide this crucial fact, which undermines any

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[14] In any event, United States courts may review and grant habeas petitions based upon an individual's conditions of confinement, even if the conviction upon which that confinement is based was entered by a foreign tribunal. *See Bishop v. Reno*, 210 F.3d 1295, 1305 (11th Cir. 2000). Both Munaf and Omar raised challenges of this nature in their habeas petitions, particularly with regard to denial of access to counsel. J.A. 39; J.A. 121-22.

argument that the tribunal was international in character. The Gardner Declarations also reveal that detainees before these tribunals are not represented by counsel and that all proceedings — including the questioning of witnesses and the introduction of documentary evidence — are conducted by the three American officers. *See* 07-394 Pet. App. 103a. Finally, as the Court of Appeals noted in *Omar*, "security internee" and "enemy combatant" determinations, "based as they are on military considerations, are a far cry from trial, judgment, and sentencing" of criminal guilt by an international tribunal. *Omar*, 479 F.3d at 8 (citing *Hamdi*, 542 U.S. at 518-19 and Major General George R. Fay, AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade 12 (Aug. 23, 2004)).

These details amply demonstrate that the panel of United States servicemembers at issue in these petitions is not of the same multinational character as the Tokyo tribunal; this fact alone distinguishes *Hirota*. When all of the differences between *Hirota* and the instant cases are considered, application of *Hirota* is clearly inapposite.

CONCLUSION

The United States military in Iraq has expressly elected not to subordinate its forces to the MNF-I. Even had it chosen to do so, the participation of the United States military in a multinational force could not change the fact that the United States military operates subject to the Constitution, laws, and treaties of the United States. Today, Omar and Munaf are in the custody of the United States military, under orders from the United States chain

of command, and such custody is by definition "under or by color of the authority of the United States." For the foregoing reasons, the National Institute of Military Justice respectfully submits that the District Court has jurisdiction over their petitions for habeas corpus.

Respectfully submitted.

Of Counsel:
PROF. STEPHEN A. SALTZBURG
THE GEORGE WASHINGTON
UNIVERSITY LAW SCHOOL
2000 H STREET, N.W.
WASHINGTON, DC 20052

DANIEL S. FLOYD
Counsel of Record
MELISSA EPSTEIN MILLS
DAVID M. HERZOG
MICHAEL ANTHONY BROWN
MICHAEL J.M. AREINOFF
ANN S. ROBINSON
333 South Grand Avenue
Los Angeles, CA 90071-3197
(213) 229-7000

Counsel for Amicus Curiae

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In the Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
Petitioners,

v.

SANDRA K. OMAR & AHMED S. OMAR,
AS NEXT FRIENDS OF SHAWQI AHMAD OMAR
Respondents.

MOHAMMAD MUNAF, ET AL.,
Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* NON-GOVERNMENTAL ORGANIZATIONS IN SUPPORT OF PETITIONERS IN *MUNAF v. GEREN*, No. 06-1666, AND IN SUPPORT OF RESPONDENTS IN *GEREN v. OMAR*, No. 07-394

BAHER AZMY
JENNY-BROOKE CONDON
SETON HALL UNIVERSITY
SCHOOL OF LAW
CENTER FOR SOCIAL
JUSTICE
ONE NEWARK CENTER
NEWARK, NJ 07102
(973) 642-8700

JOHN J. GIBBONS
COUNSEL OF RECORD
LAWRENCE S. LUSTBERG
AVIDAN Y. COVER
GIBBONS P.C.
ONE GATEWAY CENTER
NEWARK, NJ 07102
(973) 596-4500

COUNSEL FOR AMICI CURIAE

LEGAL PRINTERS, Washington DC • 202-747-2400 • legalprinters.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. OMAR AND MUNAF FACE A SUBSTANTIAL RISK OF TORTURE UPON TRANSFER TO IRAQI AUTHORITIES 4

A. Torture Is A Pervasive Part of the Iraqi Detention and Criminal Justice System 6

B. As Sunni Muslims, Omar and Munaf Face An Even Greater Risk Of Torture By The Predominantly Shiite Authorities 12

II. UNITED STATES LAW PROHIBITS THE TRANSFER OF OMAR AND MUNAF GIVEN THE SUBSTANTIAL RISK OF TORTURE BY IRAQI OFFICIALS 14

A. The Convention Against Torture And Its Implementing Legislation Categorically Prohibit The Transfer Of Omar And Munaf Into A Situation Where They Would Be Likely To Face Torture By Third Parties, Even If The Transfer Occurs Abroad 15

1. FARRA, Which Prohibits Transfers Into a Substantial Risk of Torture Anywhere in the World, Is Fully Enforceable Through Habeas Corpus 17

a. FARRA is Fully Enforceable Through Habeas Corpus.....17

b. FARRA's Broad Prohibition on Transfer Applies Extraterritorially 19

2. On Remand, the Habeas Petitioners are Entitled to a Hearing in Which they Can Present Specific Evidence Relating to their Risk of Torture.....21

B. The Due Process Clause Prohibits The Government From Transferring U.S. Citizens Into The Custody Of Another Sovereign Where Torture Is Likely 23

C. Neither Separation of Powers Principles Nor the Rule of Non-Inquiry Prohibit Judicial Inquiry into the Risk of Torture Upon Transfer.....28

1. The Government Cannot Invoke the Rule of Non-Inquiry Where it has Failed to Abide by any of the Preconditions that Might Trigger its Application 30

2. Even if the Rule of Non-Inquiry Could be Applied Outside the Extradition Context, It Would Have No Relevance to the Statutory and Constitutional Claims Asserted by Omar and Munaf.....32

a. The Passage of FARRA Mandates Judicial Inquiry into the Risk of Torture 32

b. The Rule of Non-Inquiry Does Not Bar Challenges to the Constitutionality of U.S. Government Conduct.....35

c. The Rule of Non-Inquiry Itself Contains a Well-Recognized Exception for Transfers Into Torture 36

CONCLUSION.....38

APPENDIX.....A-1

TABLE OF AUTHORITIES

Page(s)

CASES

Abdah v. Bush,
2005 WL 589812 (D.D.C. 2005).....34

Abu Ali v. Ashcroft,
350 F. Supp. 2d 28 (D.D.C. 2004) 23, 27

Adams v. United States,
317 U.S. 269 (1942) 15

Al-Anazi v. Bush,
370 F. Supp. 2d. 188 (D.D.C. 2005) 34

Alhami v. Bush,
No. 05-359, (D.D.C. Oct. 2, 2007).....15

Al-Joudi v. Bush,
406 F. Supp. 2d. 13 (D.D.C. 2005) 34

Al-Marri v. Bush,
2005 WL 774843 (D.D.C. 2005).....34

Al-Shihry v. Bush,
2005 WL 1384680 (D.D.C. 2005).....34

Belbacha v. Bush,
No. 07-5258 (D.C. Cir. Dec. 31, 2007).....15

Bowers v. DeVito,
686 F.2d 616 (7th Cir. 1982) 26

Butera v. District of Columbia,
235 F.3d 637 (D.C. Cir. 2001) 4, 24

Cadet v. Bulger,
377 F.3d 1173 (11th Cir. 2004) 18, 19

Chavez v. Martinez,
538 U.S. 760 (2003) 3, 23

Cornejo-Barreto v. Seifert,
218 F.3d 1004 (9th Cir. 2000) 19, 35

Demore v. Kim,
538 U.S. 510 (2003) 19

DeShaney v. Winnebago County Dept. of Social Services,
489 U.S. 189 (1989) 23, 24, 27

El-Banna v. Bush,
2005 WL 1903561 (D.D.C. 2005).....34

Farmer v. Brennan,
511 U.S. 825 (1994) 27

Freeman v. Ferguson,
911 F.2d 52 (8th Cir. 1990) 24

Gallina v. Fraser,
278 F.2d 77 (2d Cir.), *cert. denied*, 364 U.S. 851 (1960) 30, 36

Guerra v. Gonzales,
138 Fed. App'x 697 (5th Cir. 2005) 28

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 2, 36

Hoxha v. Levi,
465 F.3d 554 (3d Cir. 2006).....37

In re Artt,
158 F.3d 462 (9th Cir. 1998) 33

In re Burt,
737 F.2d 1477 (7th Cir. 1984) 36

INS v. Cardoza-Fonseca,
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STATEMENT OF AMICI[1]

Amici curiae Non-Governmental Organizations, Human Rights Watch, Human Rights First, Center for Constitutional Rights, Physicians for Human Rights, Islamic Society of North America, Evangelicals for Human Rights and Muslim Advocates, are not-for-profit public interest entities united in their common desire to eradicate torture and other cruel, inhuman and degrading practices across the world.[2] Through litigation, research, public education and advocacy, including for some *amici*, faith-based advocacy, *amici* have worked to ensure that the United States, as the historic leader in the development of fundamental human rights norms, abides by its obligations under the Constitution, laws and treaties to protect individuals in custody from torture, even that which might happen at the hands of third parties.

Amici are deeply concerned by the sweeping claim advanced by the government in these cases, that the executive is entirely unconstrained by law to effectuate the transfer of a person out of its custody, where there are substantial grounds for believing that person would be tortured. While *amici* take no formal position on the jurisdictional

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[1] No counsel for any party authored this brief in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters of consent from the parties have been filed with the Clerk's office along with this brief.

[2] A full statement of each *amicus'* interest can be found in the Appendix.

question presented in this appeal, they write to inform the Court of the strong factual basis for believing Mr. Shawqi Ahmad Omar and Mr. Mohammad Munaf ("Habeas Petitioners"), particularly because they are Sunni Muslims, will suffer torture and abuse at the hands of Iraqi prison officials. *Amici* also write to clarify that the United Nations Convention Against Torture, as implemented through domestic legislation, and the Fifth Amendment to the United States Constitution preclude precisely the type of extrajudicial transfer proposed by the executive here. *Amici* thus urge this Court to recognize that the judicial branch should act consistently with its historic role to protect individuals from lawless executive action. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004).

SUMMARY OF ARGUMENT

The United States Department of State, as well as numerous non-governmental institutions and regular media reports, have documented a consistent pattern of flagrant, gross and widespread human rights abuses in Iraq, including pervasive torture in Iraqi detention facilities. Because torture is so prevalent throughout all aspects of the Iraqi detention and criminal justice systems, and because Sunni Muslims are regularly targeted for abuse by Shiite prison officials, the Habeas Petitioners would face a serious risk of torture upon transfer into the hands of the Iraqi government.

Contrary to its central contention, the government does not possess unlimited authority to

transfer Omar and Munaf into Iraqi custody. In addition to the arguments advanced by the Habeas Petitioners regarding the requirement that the government demonstrate affirmative statutory or constitutional power to transfer citizens into foreign custody, *amici* write to highlight two independent limits on the government's transfer authority.

First, the United Nations Convention Against Torture ("CAT"), as implemented domestically by the Foreign Affairs Reform and Restructuring Act ("FARRA" or "the Act"), categorically prohibits the government from transferring Omar and Munaf into the custody of a state when there are substantial grounds to believe they would be tortured. This absolute prohibition, fully enforceable through the habeas statute, applies even where the proposed transfer occurs outside U.S. territory.

Second, the Due Process Clause of the Fifth Amendment places a substantive limit on government actions against citizens that would shock the conscience. *See Rochin v. California*, 342 U.S. 165 (1953). Torture is conscience-shocking conduct, *see Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (plurality op.), as are government actions that would make torture at the hands of third parties more likely, *United States v. Price*, 383 U.S. 787, 790 (1966). The allegations presented by each of the Habeas Petitioners demonstrate that, but for the unlawful actions of the government (including the proposed extrajudicial transfer), Omar and Munaf would not be facing a substantial risk of torture; they thus state a substantive due process claim

requiring adjudication on remand. *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

Finally, contrary to the government's suggestion, the rule of non-inquiry – a doctrine that applies only when the government follows the statutorily-mandated extradition procedures that trigger its application – has absolutely no relevance to the adjudication of these claims. As a common law principle, the rule of non-inquiry is abrogated by both FARRA and the Constitution. In addition, the rule of non-inquiry itself contains an important exception authorizing judicial inquiry into transfers into torture.

ARGUMENT

I. OMAR AND MUNAF FACE A SUBSTANTIAL RISK OF TORTURE UPON TRANSFER TO IRAQI AUTHORITIES.

The district court in Mr. Omar's case enjoined his transfer in part because Omar faced a strong possibility of torture at the hands of Iraqi government officials.[3] In issuing a temporary restraining order, the district judge emphasized that, as a Sunni Muslim, Omar would be particularly vulnerable to torture because Iraqi

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[3] Joint Appendix ("J.A.") 158. That conclusion was in turn informed by specific evidence presented by Omar that he "would be at grave and serious risk of being tortured if he were turned over to the Iraqi criminal authorities." J.A. 151-52 (Decl. Curt Goering, Deputy Executive. Dir., Amnesty Int'l, USA).

authorities "condoned the torture of Sunni prisoners and used their police powers to settle sectarian scores."[4]

The district court's conclusions are well-founded. The U.S. State Department, the United Nations, several humanitarian organizations and the media, have all repeatedly concluded that torture and cruel, inhuman and degrading treatment is an endemic and pervasive feature of the Iraqi criminal justice and detention systems, from investigation to sentencing. Iraqi officials have propagated the practices, inherited from the prior regime, of coercing confessions and gratuitously abusing prisoners. Moreover, the Shiite command of detention facilities has resulted in widespread targeting of Sunni prisoners for torture or abuse – particularly those asserted to have engaged in security-related crimes.

Notably, the government has never even attempted to rebut the evidence – much of it from the U.S. government itself – of the prevalence of torture throughout the Iraqi criminal justice system. It is thus uncontested on this record that Habeas Petitioners would face a grave risk of torture upon transfer into Iraqi custody.

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[4] J.A. 158.

A. Torture Is A Pervasive Part of the Iraqi Detention and Criminal Justice System.

The most recent State Department Human Rights Report on Iraq observes that "significant human rights problems" persist in Iraqi jails, including "torture and other cruel, inhuman, or degrading punishment" and recounts "[a]busive interrogation practices" including "rape, torture and abuse, sometimes leading to death."[5] This report confirms conclusions reached by the State Department for consecutive years[6] – conclusions that should be given great weight by the courts.[7]

The Human Rights Office of the United Nations Assistance Mission for Iraq ("UNAMI")[8] has

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[5] U.S. Dep't of State, Iraq: Country Reports on Human Rights Practices – 2006 (Mar. 6, 2007) http://www.state.gov/g/drl/rls/hrrpt/2006/78853.htm.

[6] *See* U.S. Dep't of State, Iraq: Country Reports on Human Rights Practices – 2005 (Mar. 8, 2006), http://www.state.gov/g/drl/rls/hrrpt/2005/61689.htm; U.S. Dep't of State, Iraq: Country Reports for Human Rights – 2004 (Feb. 28, 2005), http://www.state.gov/g/drl/rls/hrrpt/2004/41722.htm.

[7] *Kaczmarczyk v. I.N.S.*, 933 F.2d 588, 594 (7th Cir. 1991) (in evaluating country conditions, courts "give considerable weight to [State] Department's opinion"); *Rojas v. INS*, 937 F.2d 186, 190 n.1 (5th Cir. 1991) (State Departme. t Country Reports are "the most appropriate and perhaps the best resource" for "information on political situations in foreign nations").

[8] UNAMI is authorized to "promote the protection of human rights and judicial and legal reform in order to strengthen the rule of law in Iraq," and has published detailed reports on human rights violations in Iraq since July 2005. S.C. Res. 1770, ¶ 2(c), U.N. Doc. S/RES/1770 (Aug. 10, 2007).

expressed grave concerns over the "continuing reports of the widespread and routine torture or ill-treatment of detainees."[9] Similarly, the 2008 country conditions report from Human Rights Watch concludes that torture and abuse in Iraqi detention facilities remain "common."[10] The U.N. Special Rapporteur on Torture concluded that torture in Iraqi-run detention facilities was "completely out of hand" and that "[t]he situation is so bad that many people say that it is worse than in the times of Saddam Hussein."[11]

Indeed, the various forms of torture employed by government officials recall the "old habits" of the Saddam Hussein regime.[12] These tactics include:

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[9] UNAMI, Human Rights Report: 1 April – 30 June 2007, at 4 (2007), http://www.uniraq.org/FileLib/misc/HR%20Report%20Apr%20Jun%202007%20EN.pdf ("UNAMI Report").

[10] Human Rights Watch, World Report 2008, at 478 (2008); *see also* Human Rights Watch, World Report 2007, at 469-71 (2007) (government officials "systematically tortur[e] and kill[] detainees in their custody"); Human Rights Watch, HRW Index No. E1701, Vol. 17, No. 1(E), The New Iraq? Torture and ill-treatment of detainees in Iraqi custody 4, 11 (2005) (of ninety detainees interviewed, seventy-two alleged they had been tortured or ill-treated).

[11] Laura MacInnis, *U.N. Expert Says Torture in Iraq is "out of hand,"* Reuters News, Sept. 21, 2006.

[12] *See* Michael J. Frank, *Trying Times: The Prosecution of Terrorists in the Central Criminal Court of Iraq*, 18 Fla. J. Int'l L. 1, 107 n.443 (2006) ("[O]ld habits are hard to break, and apparently many Iraqi police officers would rather break bones than the habit of relying on torture to elicit confessions."); Jeffrey Fleishman & Asmaa Waguih, *Iraqi Security Tactics Evoke the Hussein Era*, L.A. Times, June 19, 2005, at A1.

> routine beatings with hosepipes, cables and other implements . . . prolonged suspension from the limbs in contorted and painful positions for extended periods, sometimes resulting in dislocation of the joints; electric shocks to sensitive parts of the body; the breaking of limbs; . . . and severe burns to parts of the body through the application of heated implements.[13]

One detainee recently recounted, "[Iraqi guards] hung me in the air by my legs and beat me with a stick . . . . They beat me with pipes on my back and stomach;" those guards also burned the detainee's hands with electric shocks and refused him food for three days.[14]

In addition to the serious sectarian conflict described *infra* at Part I.B., several factors appear to contribute to the prevalence of torture in the Iraqi criminal justice system: the perilous security situation throughout Iraq;[15] an inherited culture of

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[13] UNAMI Report, *supra* note 9, at 23; *see* U.S. Dep't of State, *supra* note 5 ("application of electric shocks, fingernail extractions . . . sexual assault, and . . . gunshot wounds."); *see also* J.A. 151 (Decl. Curt Goering) (use of "cigarettes to burn body parts, use of electric drills on arms and legs, and suffocation.").

[14] Joshua Partlow, *New Detainees Strain Iraq's Jails*, Wash. Post, May 15, 2007, at A01; *see also* Ellen Knickmeyer, *Inspectors Find More Torture at Iraqi Jails*, Wash. Post, Apr. 24, 2006, at A01.

[15] *See infra* note 32 (describing vengeance actions against persons suspected of committing security-related crimes).

policing and interrogation in which conviction by confession is celebrated for its efficiency;[16] and a generalized disregard for human rights.[17] Coercion in the criminal justice process is so acculturated and routine that forced confessions are televised to the public.[18] Asked to comment on this practice, an Iraqi Minister for Human Rights praised their perceived utility: "they have a sobering effect on people."[19]

Despite international pressure, the Iraqi government has done little to address the mass human rights violations in detention facilities, suggesting that abuses will likely continue.[20] While

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[16] *See* Frank, *supra* note 12, at 107-08; *see also* U.S. Dep't of State, Bureau of Near East Affairs, Iraq Weekly Status Report 7 (Sept. 26, 2007), http://www.state.gov/documents/organization/93029.pdf (Iraqi official "order[ed] officers to abuse their captives into making false confessions").

[17] Fleishman & Waguih, *supra* note 12, at A1 ("atmosphere of hidden brutalities" against detainees, emerged in part because many police officers "come from a culture of torture"); Peter Beaumont, *US Military police raid detention centre to stop abuse of prisoners*, The Guardian, June 30, 2004, at 4 (quoting Iraqi criminal intelligence officer, "[t]he American asked me why we had beaten the prisoners. I said we beat the prisoners because they are all bad people.").

[18] Amnesty Int'l, Unjust and Unfair: The Death Penalty in Iraq 21-25 (Apr. 2007), http://www.amnesty.org/en/alfresco_asset/198eace3-a31a-11dc-8d74-6f45f39984e5/mde140142007en.pdf.

[19] Sam Dagher, *Trying and Shaming Insurgents on Prime Time Iraqi TV*, Agence France Presse, Mar. 14, 2005. According to one Iraqi law professor, "you have a military and not a judicial body interrogating and charging people." *Id.*

[20] U.S. Dep't of State, *supra* note 5 ("[G]overnment institutions were greatly stressed and faced difficulty in

the Iraqi Ministry of Human Rights has assumed a formal inspection role over detention facilities, there has been "no discernible change in approach by the Government of Iraq towards the issue of detainee abuse and the importance of holding perpetrators criminally liable for such crimes."[21] And, because Iraq is not a party to the United Nations Convention Against Torture,[22] Omar and Munaf could not even apply to the Committee against Torture for protection from torture by the Iraqis.[23]

Moreover, the Baghdad Security Plan, initiated in February 2007, has overwhelmed the already strained Iraqi judicial and detention systems.[24] The immense overcrowding of Iraqi facilities and the corresponding lack of judicial oversight make torture and abuse all the more

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successfully responding to the challenges presented by widespread human rights abuses."); *see also* David Johnson, *U.S. Struggles to Tutor Iraqis in Rule of Law*, N.Y. Times, Feb. 16, 2008, at A8.

[21] UNAMI Report, *supra* note 9, at 4; *see also* Richard A. Oppel, Jr., *Iraqi Police Cited in Abuses May Lose Aid*, N.Y. Times, Sept. 30, 2006, at A1.

[22] *See* CAT, Status of Ratification (Oct. 2, 2007), http://www2ohchr.org/english/bodies/ratification/9.htm.

[23] *Khan v. Canada*, Comm. No. 15/1994, ¶ 12.5, U.N. Doc. A/50/44 (1994) (fact that Pakistan was not party to Convention heightens risk of torture).

[24] Solomon Moore, *Thousands of New Prisoners Overwhelm Iraqi System*, N.Y. Times, Feb. 14, 2008, at A16 (overflow in all Iraqi prisons, including Justice Ministry prisons).

likely.[25] Indeed, the Iraqi criminal justice system contributes to the spread of torture throughout the prisons. For example, trials conducted by Iraqi judges are so summary that they fail to provide defendants with a meaningful opportunity to contest the charges against them or raise the issue of torture by guards and interrogators. UNAMI explains that, in part because of the dearth of evidence presented and lack of participation by counsel, trial proceedings "are typically brief in nature, with sessions lasting on average some fifteen to thirty minutes, during which time the entire trial is concluded."[26] Even capital or serious felony cases typically involve judicial deliberations lasting only "several minutes for each trial."[27]

Mr. Munaf received just this form of truncated justice. He was afforded a summary "trial" during which he protested that his prior confession was coerced by threat of torture. The Central Criminal Court of Iraq ignored his protest and, following an *ex*

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[25] UNAMI Report, *supra* note 9, at 4 (pace of arrests following "surge" has "exceeded the authorities' ability to ensure judicial oversight for detainee population."); Molly Hennessy-Fiske, *Iraq Jails in "Appalling" State*, L.A. Times, July 21, 2007.

[26] UNAMI, Human Rights Report: 1 January – 31 March 2007, at 25 (2007), http://www.uniraq.org/FileLib/misc/HR%20Report%20Jan%20Mar%202007%20EN.pdf; s*ee also* Michael Moss, *Country in Tatters has Legal System to Match: Courts in Iraq are Riddled with Problems*, Int'l Herald Tribune, Dec. 18, 2006.

[27] *See also* UNAMI Report, *supra* note 9, at 33 (calling for death penalty moratorium in light of high risk of coerced conviction and other severe procedural defects).

parte conversation with a U.S. military officer, summarily sentenced him to death.[28]

B. As Sunni Muslims, Omar and Munaf Face An Even Greater Risk Of Torture By The Predominantly Shiite Authorities.

As Sunni Muslims, Omar and Munaf face a particularly heightened risk of torture upon transfer to the custody of Iraqi prison officials, who are predominantly Shiite Muslims. As is well-known, sectarian divisions between Sunni and Shiite Muslims have come to pervade all aspects of Iraqi social and political life, resulting in explosive cycles of violence and revenge for the past several years. According to the Iraq Study Group Report, "the composition of the Iraqi government is basically sectarian, and key players within the government too often act in their sectarian interest."[29] While most police and prison officials are Shiite, most prisoners are Sunni, as a result of which they regularly suffer harsh forms of sectarian revenge at the hands of their guards.[30] The Iraq Study Group concludes that "Iraqi police . . . routinely engage in sectarian violence, including the unnecessary detention, torture, and targeted execution of Sunni Arab civilians."[31] These U.S. government

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[28] *See* J.A. 55.

[29] James A. Baker et al., *The Iraq Study Group Report* 15 (2006).

[30] Moore, *supra* note 24, at A16.

[31] Baker, *supra* note 29, at 13. Kirk Semple, *Suspects Still at Large in Iraqi Torture Case*, N.Y. Times, Nov. 8, 2006,

conclusions confirm the persistent allegations that Sunni prisoners regularly suffer torture and abuse at the hands of Iraqi police and prison officials.[32]

Furthermore, it appears that Shiite-run armed militias have deeply infiltrated Iraqi prisons, eliminating the possibility of genuine oversight by government ministries, and presenting a dire risk of torture and abuse for Sunni prisoners.[33] According to Iraq's Deputy Justice Minister, "[w]e cannot control the prisons. It's as simple as that. Our jails are infiltrated by the militias from top to bottom, from Basra to Baghdad."[34]

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at A6 (Shiite-led security forces "seeking sectarian revenge inside ministry-run prisons.").

[32] Kirk Semple & Alissa J. Rubin, *Sweeps in Iraq Cram Two Jails*, N.Y. Times, Mar. 28, 2007, at A1 ("Iraq's detention system has been plagued by reports of torture, secret detentions and mismanagement, and Sunni Arab leaders have accused the Shiite-run government of repeatedly turning a blind eye to widespread abuses of Sunni detainees."). The risk to Omar and Munaf of transfer is heightened further by their denomination by the United States as "security internees," G. Br. 21, because Iraqi officials frequently reserve their harshest of sectarian revenge on prisoners they believe to have engaged in security-related crimes. Human Rights Watch, World Report 2006, at 450 (2006) (particular risk of torture for detainees accused of "security-related offenses").

[33] Moore, *supra* note 24, at A16 (describing alliance between Shiite guards and militias and the use of jails by militias to torture and execute Sunni prisoners).

[34] Jonathan Finer & Ellen Knickmeyer, *Shiite Militias Control Prisons, Official Says*, Wash. Post., June 16, 2006, at A01; *see also* U.S. Dep't of State, *supra* note 5 ("emerging" Shiite militia influence "within the MOJ prison facility

II. UNITED STATES LAW PROHIBITS THE TRANSFER OF OMAR AND MUNAF GIVEN THE SUBSTANTIAL RISK OF TORTURE BY IRAQI OFFICIALS.

Amici agree with the arguments made by the Habeas Petitioners and other *amici*, *see* Brief of *Amicus Curiae* M. Cherif Bassiouni *et al.*, that the executive must possess affirmative authority before transferring a U.S. citizen into the custody of a foreign government. Even if this Court finds that, in these limited circumstances, the government is not required to act pursuant to an affirmative grant of statutory or constitutional power, it is plain that there are important independent limitations on the government's authority in this case. Specifically, both the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT" or "the Convention"), 1465 U.N.T.S. 85 (Dec. 10 1984), implemented by the Foreign Affairs Reform and Restructuring Act of 1998 ("FARRA"), and the substantive due process clause of the Fifth Amendment impose an affirmative obligation against transfer by U.S.

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system."); National Security Council, Executive Office of the President, Benchmark Assessment Report 17-23 (2007) (continuing Shiite militia control of security forces and government ministries). Thus, the government's contention that the risk of torture to Omar and Munaf is lessened because they will likely be imprisoned in a Ministry of Justice ("MOJ") facility, which assertedly suffer from fewer abuses than Ministry of Interior or Ministry of Defense facilities (Resp'ts' Mem. Opp. Mot. for TRO, 14-15) is plainly contestable, and would require disposition on remand.

officials into the custody of foreign government officials who may torture petitioners. Neither the rule of non-inquiry nor the principles underlying it have any relevance to a court's obligation to consider these claims.

As such, the issuance of a standstill injunction in these cases is an entirely appropriate exercise of a district court's jurisdiction pursuant to its inherent authority and that provided by the All Writs Act, 28 U.S.C. § 1651(a), as it considers the merits of the habeas petitioners' claims. *See Adams v. United States,* 317 U.S. 269, 273 (1942); *see also Belbacha v. Bush*, No. 07-5258, Order Enjoining Transfer (D.C. Cir. Dec. 31, 2007) (enjoining transfer of Guantanamo detainee to home country where petitioner had alleged fear of torture upon transfer); *Alhami v. Bush*, No. 05-359, (D.D.C. Oct. 2, 2007), slip op. at 8 (same).

A. The Convention Against Torture And Its Implementing Legislation Categorically Prohibit The Transfer Of Omar And Munaf Into A Situation Where They Would Be Likely To Face Torture By Third Parties, Even If The Transfer Occurs Abroad.

The Convention prohibits any act of torture, CAT, art. 2.1, as well as the transfer of a person to another country where he may suffer torture. Article 3.1 of CAT specifically provides:

> No State Party shall expel, return ("refouler") or extradite a person to

> another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

CAT, art. 3.1

The Convention's prohibition on transfers into torture is absolute, and applies even if the U.S. government played no role in creating the risk of harm; it admits no exceptions, even where there exists "a state of war or a threat of war, internal political instability or any other public emergency." CAT, art. 2.2. The United States ratified CAT in 1994, and implemented the treaty domestically through FARRA. Pub. L. No. 105-277, div. G, Title XXII, codified as note to 8 U.S.C. § 1231. FARRA, therefore, imposes on U.S. officials an unambiguous obligation to comply with CAT's broad prohibition on such transfers into torture, an obligation fully enforceable by Omar and Munaf through habeas corpus.[35]

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[35] Other international treaties to which the United States is a party adopt this prohibition on the transfer of a person to a country where he or she is likely to be tortured. *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966), art. 7; Human Rights Committee, General Comment 20, art. 7, U.N. Doc. A/47/40 (1992) (interpreting Article 7 to require that states "not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or *refoulement*."); *see also* Convention Relating to the Status of Refugees, art. 33.1, 19 U.S.T. 6259, 6276, 189 U.N.T.S. 150, 152.

1. FARRA, Which Prohibits Transfers Into a Substantial Risk of Torture Anywhere in the World, Is Fully Enforceable Through Habeas Corpus.

The United States' obligations under CAT are fully binding and enforceable through FARRA. Although Articles 1 through 16 of the Convention, when ratified by the Senate, were deemed not to be "self-executing,"[36] that reservation does not diminish the U.S. government's obligation to comply with the Convention's terms.[37] At most, it suggests some ambiguity about whether the treaty is directly enforceable by Article III courts or in habeas corpus.[38] Regardless, because FARRA implements CAT's Article 3 provision domestically, FARRA's prohibition on transfers into torture is binding law, plainly enforceable through habeas.

a. FARRA is Fully Enforceable Through Habeas Corpus.

FARRA establishes a statutory prohibition against the transfer of a person "to a country in which there are substantial grounds for believing the

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[36] S. Exec. Rpt. 101-30, at 31 (1990).

[37] Louis Henkin, *Treaties in a Constitutional Democracy*, 10 Mich. J. Int'l L. 406, 425 (1989) ("The international obligation of the United States under a treaty is immediate, whether a treaty is self-executing or not.").

[38] *Compare* Carlos M. Vasquez, *The Four Doctrines of Self-Executing Treaties*, 89 Am. J. Int'l L. 695, 719-21 (1995) *with Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 808 (D.C. Cir. 1984) (Bork, J., concurring).

person would be in danger of being subjected to torture." FARRA, § 2242(a). The writ of habeas corpus extends to claims that a person is in custody in violation of the laws of the United States. 28 U.S.C. § 2241(c)(3). A person in custody of the United States may, therefore, challenge his detention and related transfer in violation of FARRA just as he or she would challenge the violation of any other federal statute. *See Saint Fort v. Ashcroft*, 329 F.3d 191, 202 (1st Cir. 2003) ("FARRA and the regulations are now the positive law of the United States, and, as such, are cognizable under habeas."); *accord Ogbudimpka v. Ashcroft*, 342 F.3d 207, 220 (3d Cir 2003); *Wang v. Ashcroft*, 320 F.3d 130, 141 n.16 (2d Cir. 2003); *Cadet v. Bulger*, 377 F.3d 1173, 1182 n.7 (11th Cir. 2004); *see also Khouzam v. Hogan*, No. 07-0992, slip op. at 15 (M.D. Pa. Jan. 10, 2008) ("Non-refoulement is the law of the United States.").

The government may argue that § 2242(d) of FARRA, which purports to preclude judicial review over claims arising under the Act, also strips the district court of habeas corpus jurisdiction to hear claims raising violations of § 2242(a) of the Act.[39] Though the assertion is not ripe for this Court's adjudication, it is, in any event, foreclosed by this Court's decision in *INS v. St. Cyr*, which considered a nearly identical jurisdiction-stripping provision.

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[39] Section 2242(d) provides, in relevant part, that "nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section."

533 U.S. 289, 298 (2001); *see also Demore v. Kim*, 538 U.S. 510 (2003). Applying the analysis of *St. Cyr* to FARRA, numerous courts have held that § 2242(d) does not contain "specific and unambiguous statutory directives to effect a repeal," *St. Cyr*, 533 U.S. at 299, and that district courts, therefore, retain habeas jurisdiction to consider CAT and FARRA claims. *Ogbudimpka*, 342 F.3d at 215-22; *Cadet*, 377 F.3d at 1182; *Saint Fort*, 329 F.3d at 200-02; *Wang*, 320 F.3d at 140-43; *Singh v. Ashcroft*, 351 F.3d 435, 441-42 (9th Cir. 2003); *see also Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1013 (9th Cir. 2000) (finding no bar to habeas jurisdiction, prior to *St. Cyr* decision). *But see Mironescu v. Costner*, 480 F.3d 664, 673-76 (4th Cir. 2007). Thus, the Habeas Petitioners' CAT claims are not foreclosed; remand for adjudication by the district court is required.

b. FARRA's Broad Prohibition on Transfer Applies Extraterritorially

The government argues that Iraq has exclusive jurisdiction over Omar because he is already in Iraq and that no treaty or statute bars his transfer to Iraqi authorities. G. Br. 38-39. Indeed, the government suggests that, "when the United States has custody of a person in a foreign country, it is a misnomer to refer to the United States 'transferring' the person to that country's custody." G. Br. at 43. However, the government's position is plainly contradicted by the clear language and purpose of CAT and FARRA.

FARRA expressly covers *any* hand-over from one sovereign to another, prohibiting the United States from "expel[ing], extradit[ing], or *otherwise effect[ing]* the involuntary return" of a person. § 2242(a) (emphasis added). FARRA ensures that this obligation applies "*regardless of whether the person is physically present in the United States.*" *Id.* (emphasis added). This absolute – and extraterritorial – prohibition on transfers to likely torture is also mandated by Article 3 of the Convention.[40] The drafters intended Article 3 to apply to "any person who, *for whatever reason*, is in danger of being subjected to torture if handed over to another country . . . [and to] *cover all measures* by which a person is physically transferred to another state."[41] It also applies in military occupations.[42] An

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[40] FARRA's clear and explicit language, (as well as CAT's drafting history) thus renders inapposite the Court's decision in *Sale v. Haitian Ctrs. Council*, 509 U.S. 155 (1993), to decline extraterritorial application of the Immigration and Nationality Act, which contains no such express terms.

[41] J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture: A Handbook On The Convention Against Torture And Other Cruel, Inhuman, Or Degrading Treatment Or Punishment* ("Handbook on CAT") 125-26 (1988) (emphasis added); *see also* Committee Against Torture, *Conclusions and Recommendations of the Committee Against Torture Concerning the Second Report of the United States of America*, ¶ 20, U.N. Doc. CAT/C/USA/CO/2 (July 25, 2006) ("Committee Conclusions") (Article 3 applies extraterritorially).

[42] Burgers & Danelius, *Handbook on CAT* at 131 (CAT meant to apply to "territories under military occupation, to colonial territories and to any other territories over which a State has factual control."); *see also* Committee Conclusions, ¶ 15 (territory under State party's jurisdiction "includes all

interpretation of FARRA that would permit an extraterritorial transfer, therefore, would not only violate the statute's plain terms, it would also be inconsistent with well-settled international law interpretations of CAT. *See Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804).

2. On Remand, the Habeas Petitioners are Entitled to a Hearing in Which they Can Present Specific Evidence Relating to their Risk of Torture.

Although the Department of Defense ("DoD") has not issued regulations pursuant to § 2242(b) of FARRA, the absence of regulations does not absolve the DoD from its legal obligations under the treaty and the statute not to transfer persons into torture. This Court, of course, need not adjudicate the legal or factual allegations relating to petitioners' CAT and FARRA claims. Rather, the district court on remand is positioned to resolve any contested questions about the legal scope of CAT and FARRA, and conduct a factual hearing on the merits of petitioners' FARRA and CAT claims.

In particular, FARRA and CAT both prohibit the transfer of a person where there are "substantial grounds for believing the person would be in danger of being subjected to torture," *see* § 2242(a); CAT, art. 3.1. District courts regularly interpret this

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areas under the de facto effective control of the state party, by whichever military or civil authorities such control is exercised.").

requirement under regulations which employ a "more likely than not" standard. 8 C.F.R. § 208.16(c)(2); 22 C.F.R. §§ 95.1(c), 95.2(b).[43] In making that assessment, the district court may consider "all evidence relevant to the possibility of future torture." §§ 208.16(c)(3); § 95.2(b)(2); *see also* CAT, art. 3.2 (court should "take into account all relevant considerations including . . . a consistent pattern of gross, flagrant or mass violations of human rights.").

This would include testimonial evidence to supplement that already in the record, *see* J.A. at 151, as well as government and non-governmental reports on country conditions documenting systematic torture and abuse. *See supra* Part I. Particularly persuasive to a court would be extensive evidence from the U.S. government itself regarding the prevalence of torture in Iraq and, therefore, the substantial risk Omar and Munaf will face upon transfer into Iraqi criminal custody. *See Kaczmarczyk*, 933 F.2d at 594; *Rojas*, 937 F.2d at 190 n.1. In any event, it certainly was not an abuse of discretion for the district court to have enjoined a

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[43] *Amici* believe the "substantial grounds" standard of Article 3 of CAT requires a lesser showing of risk than the "more likely than not" standard employed by U.S. domestic regulations implementing FARRA. *See* Committee Against Torture, General Comment 1, *Communications concerning the return of a person to a State where there may be grounds he would be subjected to torture (article 3 in the context of article 22)*, ¶ 6, U.N. Doc. A/53/44, annex IX at 52 (1998). *Amici* believe, however, that Omar and Munaf have stated a strong claim for relief under either standard.

transfer, in light of the strong – and as yet *unrebutted* – evidence of the likelihood of torture before it. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 69 (D.D.C. 2004) (denying government's motion to dismiss because, among other reasons, "the United States has not offered evidence to rebut any of the information supplied" regarding abuse faced by habeas petitioner "even though such evidence is in many instances directly in its control.")

B. The Due Process Clause Prohibits The Government From Transferring U.S. Citizens Into The Custody Of Another Sovereign Where Torture Is Likely.

The Fifth Amendment – unquestionably applicable to U.S. citizens abroad such as Omar and Munaf, *see Reid v. Covert*, 354 U.S. 1 (1957) – prohibits abusive and shocking government conduct, among which torture is the paradigmatic example. *See, e.g., Rochin v. California*, 342 U.S. 165, 172 (1952); *Chavez v. Martinez*, 538 U.S. 760, 773 (2003) (plurality). Just as the government may not itself engage in torture, so it may not hand citizens over to others who will torture, particularly after taking affirmative acts that make the prospect of torture more likely.

Specifically, the Fifth Amendment guarantee of substantive due process prohibits the state from affirmatively exposing citizens to serious harm, irrespective of the source. *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *United States v. Price*, 383 U.S. 787, 790

(1966). Although the Constitution generally does not protect citizens from harm by third parties, in *DeShaney* the Court recognized that a duty to protect may arise if the state played a part in the "creation" of the danger or otherwise rendered a citizen "more vulnerable" to harm. 489 U.S. at 201. Following that reasoning, nearly all of the Circuit Courts of Appeals recognize that the government violates Fifth Amendment protections when it affirmatively places a citizen in danger, even a danger posed by third-parties.[44] This principle is not a novel constitutional theory, but a core principle of due process.[45]

For example, in *United States v. Price*, 383 U.S. 787, 799 (1966), this Court held that due process limits the government's authority to take

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[44] *See, e.g., Lockhart-Bembery v. Sauro*, 498 F.3d 69 (1st Cir. 2007); *Pena v. DePrisco*, 432 F.3d 98 (2d Cir. 2004); *Kneipp v. Tedder*, 95 F.3d 1199, 1210 (3d Cir. 1996); *Pinder v. Johnson*, 54 F.3d 1169, 1175-77 (4th Cir. 1995) (en banc), *cert. denied*, 516 U.S. 994 (1995); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066-67 (6th Cir. 1998); *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993); *Freeman v. Ferguson*, 911 F.2d 52, 54-55 (8th Cir. 1990); *Wood v. Ostrander*, 879 F.2d 583, 589-90 (9th Cir. 1989); *Uhlrig v. Harder*, 64 F.3d 567, 572 (10th Cir. 1995); *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001).

[45] *See Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1061 n.1 (9th Cir. 2006) ("the 'state-created danger' doctrine predates *DeShaney*" which is "more reasonably understood as an acknowledgment and preservation of the doctrine, rather than its source."); *Butera*, 235 F.3d at 651 (recognition of state-created danger doctrine was "hardly breaking new ground.") (internal citations and quotations omitted).

custody of U.S. citizens and deliver them – without judicial process – into the hands of third-parties who would harm them. In *Price*, the Court found that the facts supported an indictment of Mississippi police officials under 18 U.S.C. § 371, for conspiracy to violate the Fourteenth Amendment, where those officials took actions that made the victims' interception and murder by third parties more likely. The Court noted that "the State, without the semblance of due process of law as required of it by the Fourteenth Amendment, used its sovereign power and office to release the victims from jail so that they were not charged and tried as required by law, but instead could be intercepted and killed." *Id.* at 799. The government here used its "offices" to detain Omar and Munaf and now seeks to transfer them – without any judicial process – into the hands of third parties likely to harm and even execute them.

Omar and Munaf alleged specific misconduct by U.S. officials that render them more vulnerable to torture upon transfer than they otherwise would be absent U.S. action. Petitioners assert that U.S. officials took custody of them without lawful process, J.A. 28-29, 105-106; held them virtually incommunicado, J.A. 27, 105; subjected them to prolonged arbitrary detention without charges for more than two years, J.A. 28, 105; abused them, J.A. 51, 111; interrogated and threatened them and their families with torture and sexual violence, J.A. 51-52, 55, 114; denied them access to counsel, J.A. 27, 34, 114-116; and frustrated access to U.S. consular

officials, J.A. 113. Omar and Munaf thus allege that, but for this government misconduct, they could have proven themselves innocent of wrongdoing before a lawful tribunal and obtained release in a timely manner, J.A. 52, 55, 113, avoiding the prospects of transfer, torture, and imminent death they now confront.

In addition, both Omar and Munaf allege that U.S. officials interrogated them[46] and, in Munaf's case, coerced a false confession, J.A. 51-52, 55. The possibility that U.S. officials would share the fruits of their allegedly illegal interrogations with Iraqi officials as part of a collaborative effort to convict and punish U.S. citizens could rise to the level of a substantive due process violation, in and of itself. *See Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).[47] Of additional concern in Munaf's case, the U.S. officials are alleged to have helped secure his conviction by falsely claiming that a U.S. military official, Lt. Robert M. Pirone, was properly

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[46] While detained by the United States, Mr. Omar was questioned by American agents who told him they worked for the Federal Bureau of Investigation. Burke Decl., Ex. A to Renewed Request for Access & Motion for Records, para. 6, *Omar v. Harvey*, No. 01-02374 (D.D.C. Apr. 21, 2006) (dkt. 29-3). During these interrogations, Mr. Omar was beaten, and interrogators threatened his wife and son. *Id.*

[47] As part of his trial in the Iraqi Criminal Court, Munaf pleaded that his confession to U.S. officials was procured by torture and was false, but he was convicted anyway on the basis of his confession. J.A. 51-56. Thus, but for the abusive interrogation techniques undertaken by U.S. officials, Munaf may not have faced the grave risk of torture resulting from his conviction and transfer that he now faces.

"appearing on behalf of the Romanian embassy" to register a "formal complaint" against Munaf, which Romania did not in fact authorize. J.A. 54-55; 62-63; J.A. 67-68, 70. Munaf further alleges that U.S. officials held *ex parte* conversations with the presiding judicial officer immediately prior to the imposition of his death sentence. J.A. 55-56. This alleged misconduct alone made Munaf "more vulnerable to danger [than] had they not intervened." *Kneipp v. Tedder,* 95 F.3d 1199, 1209 (3d Cir. 1996). *See also United States. v. Karake*, 281 F. Supp. 2d 302 (D.D.C. 2003) (permitting discovery to evaluate the possibility of a joint venture between U.S. and Rwandan officials to deprive citizen of constitutional rights).[48]

The government's violation of Omar and Munaf's substantive due process rights is exacerbated by their prolonged detention, which created a "special relationship" between the parties. *DeShaney*, 489 U.S. at 199-200; *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (obligation to protect prisoners from third parties where the state "stripped" them of "virtually every means of self-protection and foreclosed their access to outside

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[48] Omar's further claim that the government intends to "turn [him] over to the custody of Iraqi authorities in an effort to evade the strictures of United States law," J.A. 117, alleges an independent violation of due process warranting further factual inquiry. *See Abu Ali v. Ashcroft*, 350 F. Supp. 2d 28, 40 (D.D.C. 2004) (government does not possess "unreviewable power to separate an American citizen from the most fundamental of his constitutional rights merely by choosing where he will be detained or who will detain him").

aid"); *Wang v. Reno*, 81 F.3d 808, 818 (9th Cir. 1996) (by paroling witness into United States to testify and placing him in custody, government "created a special relationship" that carried obligation to protect him from resulting liberty deprivations that would occur upon transfer). As a result of this "special relationship," the U.S. government cannot disclaim responsibility for the resulting, foreseeable harm that would follow, even if carried out by third parties.[49]

C. Neither Separation of Powers Principles Nor the Rule of Non-Inquiry Prohibit Judicial Inquiry into the Risk of Torture Upon Transfer.

The government asserts that the rule of non-inquiry and its underlying separation of powers

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[49] Cases rejecting the availability of the state-created danger defense to deportation, do so for reasons that would only support the doctrine's applicability in this transfer context. *See, e.g., Kamara v. Att'y Gen. of the U.S.*, 420 F.3d 202, 216-17 (3d Cir. 2005); *Guerra v. Gonzales*, 138 F.App'x 697, 699 (5th Cir. 2005). First, in those cases, unlike here, the petitioners failed to allege that U.S. actors contributed in any way to the danger abroad or rendered non-citizens more vulnerable to such harm. Second, those deportation decisions are premised on separation of powers concerns about supplanting the fully-developed and exclusive statutory framework for handling refugee claims of persecution or torture under the INA. *See Kamara*, 420 F.3d at 217-18. In this case, by contrast, the government's failure to follow constitutional or statutorily-mandated procedures in advance of transfer suggests a stronger role for the judicial branch in placing a substantive limit on executive conduct.

principles categorically shield any aspect of their transfer decision from judicial review. G. Br. at 45-47. Such a broad understanding of the rule is unsupported by law or theory. Indeed, the government's assertion that the concerns underlying the rule are "even stronger" outside the extradition context, G. Br. at 47 – that is, when the executive acts unconstrained by law – stands the rule on its head.[50]

The rule of non-inquiry, a federal common law principle, emerges by implication from the statutorily-delegated responsibilities that are divided between the judicial and executive branches. The rule cannot be removed from the well-structured extradition context in order to give the executive a blank check to transfer U.S. citizens into patently inhumane conditions. And, even if the rule could be extended outside the extradition process, it would in no way bar judicial review of Omar and Munaf's specific transfer-related claims in this case.

First, the common law rule of non-inquiry is plainly trumped by statutory obligations expressly imposed upon judges by FARRA, which *mandate* an inquiry into the possibility of torture by a foreign government. Second, nothing in the rule prohibits inquiry into the constitutionality of a U.S. official's

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[50] The government unfairly casts Omar's claim as asserting "a right to evade Iraqi jurisdiction." G. Br. at 47. In fact, in addition to asserting an entitlement to a challenge to the lawfulness of U.S. detention, Resp't. Br. 20, Omar and Munaf invoke their right to be free from torture.

decision to transfer. Finally, the rule itself affords an exception where a possible transfer would subject the petitioner to treatment that would offend the court's sense of decency, such as subjection to torture. *See Gallina v. Fraser*, 278 F.2d 77 (2d Cir. 1960), *cert. denied*, 364 U.S. 851 (1960).

1. The Government Cannot Invoke the Rule of Non-Inquiry Where it has Failed to Abide by any of the Preconditions that Might Trigger its Application.

The rule of non-inquiry emerges as part of the formal extradition process, and the principles underlying it mandate that the rule be limited to that context. *See generally*, M. Cherif Bassiouni, *The Law of International Extradition: United States Law and Practice* 604-42 (5th ed. 2007). Thus, the government may not invoke the rule of non-inquiry to shield its conduct here, particularly where it has failed in the first instance to abide by the extradition regime's clear statutory framework. *Cf. Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-40 (1952) (Jackson, J., concurring) (judicial power to scrutinize executive conduct greater when executive is acting contrary to express or implied will of Congress).

Extradition, which must be pursued according to statute, *see* 18 U.S.C. § 3184, contemplates a "two-step procedure" which divides responsibility between a "judicial officer and the Secretary of State." *United States v. Kin-Hong*, 110 F.3d 103, 109 (1st Cir. 1997). Once a magistrate finds the

person extraditable, the Secretary of State thereafter is statutorily authorized to reverse the determination, decline to extradite on a range of discretionary factors, affirmatively authorize the extradition, or attach conditions to the transfer. *See* 18 U.S.C. § 3196; *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997); Bassiouni, *International Extradition, supra* at 951.

The rule of non-inquiry derives directly from this statutory division of responsibility, by which the judiciary defers to the Secretary of State's discretion regarding a range of foreign relations considerations. S*ee e.g.*, *Kin-Hong*, 110 F.3d at 111 n.12 (rule of non-inquiry "defers" assessment about potential treatment "to the second part of every extradition proceeding – review of extraditability and determination of the appropriateness of surrender by the Secretary of State"); *Koskotas v. Roche*, 931 F.2d 169, 174 (1st Cir. 1991) (declining to consider fairness of Greek trial procedures upon extradition because under 18 U.S.C. § 3186, petitioner "may raise these concerns with the Secretary of State"); *accord Prasoprat v. Benov*, 421 F.3d 1009, 1016 (9th Cir. 2005), *cert. denied*, 546 U.S. 1171 (2006).[51] It follows that the courts cannot be stripped of their role to examine transfer decisions under the rule of non-inquiry, when the executive has deliberately eschewed the statutory framework that would trigger the applicability of rule in the first instance. That is the case here.

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[51] That discretion, however, is finally limited where there is a credible claim of torture. *See infra* at Part II.C.2(a).

2. Even if the Rule of Non-Inquiry Could be Applied Outside the Extradition Context, It Would Have No Relevance to the Statutory and Constitutional Claims Asserted by Omar and Munaf.

Even if the government were correct that principles underlying the rule of non-inquiry apply outside the formal extradition context, the rule would not bar judicial inquiry into the lawfulness of the transfer asserted by Omar and Munaf in this case. First, they challenge the executive's failure to abide by binding statute which specifically commands judicial inquiry into the likelihood of torture upon transfer. Second, Omar and Munaf challenge the constitutionality of United States actions as part of the decision to transfer, not the legitimacy of Iraqi trial procedures. Finally, the rule of non-inquiry itself contains a recognized exception for potential transfers into torture.

a. The Passage of FARRA Mandates Judicial Inquiry into the Risk of Torture.

The rule of non-inquiry, a product of the federal common law, cannot stand in the face of a federal statute. *Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981) ("We have always recognized that federal common law is subject to the paramount authority of Congress.") (internal quotations omitted); *see* Bassiouni, *International Extradition*, *supra* at 796. As described, FARRA broadly prohibits any form of transfer into possible torture and is thus fully

enforceable through habeas corpus. *See supra* Part II.A. Thus, even the broadest construction of the rule of non-inquiry would be trumped by a judicial obligation to ensure compliance with FARRA. This obligation, in turn, requires a federal court to inquire into the potential treatment a petitioner may receive at the hands of a foreign government. *See Mironescu*, 480 F.3d at 671 (recognizing that federal law embodied in FARRA now unambiguously makes potential treatment on transfer relevant and justiciable in habeas); *cf. In re Artt*, 158 F.3d 462, 474-75 (9th Cir. 1998) (1985 U.S.-U.K. extradition treaty mandates inquiry into British judicial system).[52]

Far from offending principles of international comity or questioning the quality of the Iraqi criminal justice system, G. Br. at 47, the district court pursuant to a FARRA claim "would be required to answer only the straightforward question of whether a fugitive would likely face torture in the requesting country." *Mironescu*, 480 F.3d at 672. And myriad decisions review identical inquiries undertaken as part of asylum laws, *see INS v. Cardoza-Fonseca*, 480 U.S. 421, 428 (1987) (alien eligible for asylum upon demonstration of a "well-founded fear of persecution" in his home country). Moreover, even in the extradition framework, a

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[52] All of the cases cited by the government in support of its contention that the rule of non-inquiry categorically bars any judicial role predate the enactment of FARRA, except for *Prasoprat*, 421 F.3d 1009, in which allegations of potential torture on transfer were not raised by the petitioner.

habeas court may be called upon to apply the "political offense" exception, which requires a sensitive judicial inquiry into the foreign sovereign's motivation for charging the habeas petitioner. *See, e.g., Ordinola v. Hackman*, 478 F.3d 588, 595 (4th Cir. 2007) ("the vast majority of modern-day extradition treaties" provide a political offense exception to extradition); *Koskotas*, 931 F.2d at 172-73 (detailing nature of judicial inquiry under political offense exception).[53]

Not even the government's unilateral assurance that it would "object" to the transfer of Omar and Munaf if "it believed that they would likely be tortured," G. Br. at 47, displaces that judicial review mandated by federal law. *See Khouzam v. Hogan*, No. 07-0992, slip op. at 19 ("consultation among members of the Executive Branch . . . does not satisfy the constraint of the Fifth Amendment").

Finally, even if the government chooses – or is ordered by the court – to follow the procedures set forth in the extradition statute, 18 U.S.C. § 3184; *see*

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[53] Numerous courts have also issued injunctions barring transfers of habeas petitioners out of DoD custody and into the possibility of torture by a third country, despite government contentions that such relief would violate the rule of non-inquiry. *See Al-Marri v. Bush*, 2005 WL 774843 (D.D.C. 2005); *El-Banna v. Bush*, 2005 WL 1903561 (D.D.C. 2005); *Al-Joudi v. Bush*, 406 F. Supp. 2d. 13 (D.D.C. 2005); *Al-Shihry v. Bush*, 2005 WL 1384680 (D.D.C. 2005); *Abdah v. Bush*, 2005 WL 589812 (D.D.C. 2005). *But see Al-Anazi v. Bush*, 370 F. Supp. 2d. 188, 195 (D.D.C. 2005).

Brief of *Amicus Curiae* M. Cherif Bassiouni *et al.*, the Habeas Petitioners could ultimately utilize FARRA to challenge the Secretary of State's decision to certify his extraditability. *See Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1015-16 (9th Cir. 2000) (in light of FARRA, habeas petitioner could obtain judicial review under APA of Secretary of State's decision to extradite in spite of asserted likelihood of torture).

b. The Rule of Non-Inquiry Does Not Bar Challenges to the Constitutionality of U.S. Government Conduct.

Contrary to the government's claim, Omar and Munaf do not challenge whether the Iraqi criminal system fails U.S. constitutional standards or is otherwise procedurally defective. *See* G. Br. at 45-46. Instead, as specifically described, *supra* Part II.B. Omar and Munaf contend that U.S. officials, by undertaking a series of unlawful actions in an attempt to effect an extrajudicial transfer, are here violating Omar and Munaf's due process rights. *See also* R. Br. at 45-53.

A court is equally competent to judge the constitutionality of U.S. actions whether they occur at home or abroad. *See Reid v. Covert*, 354 U.S. 1, 7-9 (1957). Similarly, an extradition or extra-judicial transfer that violates a citizen's constitutional rights is clearly reviewable in habeas. In *Mironescu*, 480 F.3d at 671-72, the court specifically distinguished extradition cases relied upon by the government, including *Neely v. Henkel*, 180 U.S. 109, 123 (1901),

raising challenges to foreign trial systems and barred by the rule of non-inquiry, from constitutional challenges to U.S. government action which could not be so barred. The court rejected the claim that the executive has plenary extradition or transfer power for, while the executive "has unlimited discretion to *refuse* to extradite a fugitive, it lacks the discretion to extradite a fugitive when extradition would violate his constitutional rights." *Id.* at 670 (internal citations omitted). *See also Wang*, 81 F.3d at 816 (affirming injunction issued against deportation where habeas petitioner raised substantive due process claims against U.S. government actors "wholly independent of any [claims] assertable under the INA"); *In re Burt*, 737 F.2d 1477, 1482-85 (7th Cir. 1984) (affirming district court's consideration of procedural due process claim in habeas challenge to extradition). In sum, despite the asserted foreign relations context of this case, the judicial branch must retain its traditional role of examining executive conduct "when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. at 536. Nothing less is at stake here.

c. The Rule of Non-Inquiry Itself Contains a Well-Recognized Exception for Transfers Into Torture.

Finally, courts applying the rule of non-inquiry themselves recognize an exception for transfer based on a plausible fear of torture. *See Gallina*, 278 F.2d at 79 (recognizing that courts may block extradition in situations in which "relator, upon extradition, would be subject to procedures or

punishment so antipathetic to a federal court's sense of decency"); *accord Kin-Hong*, 110 F.3d at 112; *Prushinowski v. Samples*, 734 F.2d 1016, 1019 (4th Cir. 1984); *Lopez-Smith*, 121 F.3d at 1322; *Hoxha v. Levi*, 465 F.3d 554 (3d Cir. 2006). Torture is rightly considered *sui generis* and thus manifestly distinct from routine variations among criminal justice systems that courts avoid evaluating. *See Burt*, 737 F.2d at 1485 n.11 (foreign state's criminal process may lose otherwise routine "presumption of fairness" if relator demonstrates transfer would expose to treatment "antipathetic to a federal court's sense of decency"); *accord Parretti v. United States*, 122 F.3d 758 (9th Cir. 1997). For this reason too, even independent of CAT and FARRA, petitioners are entitled to challenge in the district court their transfer into possible torture.

CONCLUSION

For the foregoing reasons, the D.C. Circuit's decision in *Geren v. Omar*, No. 07-397, should be affirmed and its decision in *Munaf v. Geren*, 06-166 should be vacated and remanded for further proceedings.

Respectfully submitted,

BAHER AZMY
JENNY-BROOKE CONDON
SETON HALL UNIVERSITY
SCHOOL OF LAW
CENTER FOR SOCIAL JUSTICE
Newark, NJ 07102
(973) 642-8700

JOHN G. GIBBONS*
LAWRENCE S. LUSTBERG
AVIDAN Y. COVER
GIBBONS, P.C.
One Gateway Center,
Newark, NJ 07102
(973) 596-4500

* *Counsel of Record*

February 28, 2008

APPENDIX

Amicus **Human Rights Watch** ("HRW") is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to bring public pressure upon offending governments and others to end abusive prac-tices. For the past six years, HRW has worked extensively to document U.S. counterterrorism policies and practices and to promote effective and lawful responses to terrorist threats. HRW has monitored and reported on human rights in Iraq since the early 1990s.

Amicus **Human Rights First** ("HRF") is a non-profit, nonpartisan organization that has worked since 1978 to create a secure and humane world by advancing justice, human dignity and respect for the rule of law. HRF protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security and human rights advocates who are targeted for defending the rights of others. HRF works to prevent violations against these groups and to seek justice and accountability for violations against them.

Amicus **Center for Constitutional Rights** ("CCR") is a non-profit legal and educational

organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, and to strengthen the broader movement for constitutional and human rights. In addition to CCR's long history of advocating on behalf of civil rights, CCR has been instrumental in advancing the protection of international human rights. Currently, CCR represents several individuals who have been, or are in danger of being, transferred from U.S. custody to the custody of foreign governments despite known risks of torture or cruel, inhuman or degrading treatment.

Amicus **Physicians for Human Rights** ("PHR"), since 1986, has mobilized health professionals to advance the health and dignity of all people through action that promotes respect for human rights. PHR has been in the forefront of the global fight against torture and was one of the lead authors of the Istanbul Protocol on documenting torture adopted by the United Nations in 1999. PHR joins in this brief in support of constitutional principles and international instruments prohibiting torture.

Amicus **Islamic Society of North America** ("ISNA") was established in 1981 as an association of Muslim organizations and individuals that provides a common platform for presenting Islam, supporting

Muslim communities, developing educational, social and outreach programs and fostering good relations with other religious communities, as well as with civic and service organizations. ISNA is a founding member of the National Religious Campaign Against Torture and has been a consistent advocate for human rights and dignity for all persons.

Amicus **Evangelicals for Human Rights** ("EHR") is a project of the National Religious Campaign Against Torture that seeks to articulate a compelling biblical case for a zero-tolerance stance on torture by any government for any reason, including the United States in its war on terror, and advocate the application of that commitment in the conduct of the U.S. war on terror. Founded in 2006, HER focuses its education efforts on the evangelical community and seeks to reaffirm the centrality of human rights as an unshakeable biblical obligation fundamental to an evangelical Christian social and moral vision.

Amicus **Muslim Advocates** is a nonprofit educational, charitable entity dedicated to promoting and protecting freedom, justice and equality for all, regardless of faith, using the tools of legal advocacy, policy engagement and education and by serving as a legal resource to promote the full participation of Muslims in American civic life. Founded in 2005, Muslim Advocates is a sister entity to the National Association of Muslim Lawyers, a network of over 500 Muslim American legal professionals. Muslim Advocates seeks to protect the founding values of our nation and believes our nation and its people can be

safe and secure without sacrificing constitutional rights and protections.

107 a 11

4709 Nos. 07-394 and 06-1666

IN THE

Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, *et al.*,

Petitioners,

—v.—

SANDRA K. OMAR and AHMED S. OMAR,
as next friends of Shawqi Ahmad Omar,

Respondents.

(Caption continued on inside cover)

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW AND OF THE FEDERAL COURTS IN SUPPORT OF THE HABEAS PETITIONERS

Of Counsel:

JUDITH RESNIK
127 Wall Street
New Haven, Connecticut 06511

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

DANIEL F. KOLB
Counsel of Record
BRIAN S. WEINSTEIN
WILLOW D. CRYSTAL
DANIEL J. SCHWARTZ
KEVIN P. HANCOCK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000

Attorneys for Amici Curiae

MOHAMMAD MUNAF, *et al.*,

Petitioners,

—v.—

PETE GEREN, SECRETARY OF THE ARMY, *et al.*,

Respondents.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. TWO CENTURIES OF THE WRIT OF HABEAS CORPUS 4

A. The Nineteenth Century 4

B. The Second World War 10

C. From the 1960s to the Present 19

II. THIS COURT'S JURISPRUDENCE IDENTIFIES KEY FACTORS THAT AFFECT THE AVAILABILITY OF HABEAS CORPUS 23

A. Status of the Detainee in Correlation with Other Key Factors 25

B. The Source of the Detention Authority 27

1. Executive Detention Absent Judicial or Military Proceedings 27

2. Military Tribunals 28

3. Foreign Tribunals 29

C. Statutory and Constitutional Predicates for Habeas Jurisdiction..... 30

III. UNDER THIS COURT'S PRECEDENTS, THE KEY FACTORS BARRED HABEAS AVAILABILITY IN *HIROTA* AND REQUIRE IT FOR OMAR AND MUNAF 31

CONCLUSION 34

APPENDIX A LIST OF *AMICI CURIAE* 1

TABLE OF AUTHORITIES

Page

Cases

Ahrens v. Clark, 335 U.S. 188 (1948) 13

Ex parte Betz, 329 U.S. 672 (1946) 11, 26, 33

Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807) 4, 5, 6, 30

Boumediene v. Bush, 127 S. Ct. 1478, *reh'g granted, order vacated by* 127 S. Ct. 3078 (2007) 31

Braden v. 30th Judicial Circuit Court of Kentucky, 410 U.S. 484 (1973) 19, 20

Brown v. Allen, 344 U.S. 443 (1953) 27

Burns v. Wilson, 346 U.S. 137 (1953) 15, 16, 25, 28, 33

Burns v. Wilson, 346 U.S. 844 (1953) 15, 16

In re Bush, 336 U.S. 971 (1949) 13, 26, 33

Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858) 7, 28

Eisentrager v. Forrestal, 174 F.2d 961 (D.C. Cir. 1949), *rev'd sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950) 14

Everett ex rel. Bersin v. Truman, 334 U.S. 824 (1948) 12

TABLE OF AUTHORITIES—Continued

Page

Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006) 21

Hamdi v. Rumsfeld, 542 U.S. 507 (2004) 22, 23, 25, 28

Ex parte Hayes, 414 U.S. 1327 (1973)..... 16

Hirota v. MacArthur, 338 U.S. 197 (1948) .....*passim*

INS v. St. Cyr, 533 U.S. 289 (2001) .....*passim*

Johnson v. Eisentrager, 339 U.S. 763 (1950) 14, 15, 26, 32

In re Kaine, 55 U.S. (14 How.) 103 (1852)..... 9, 25, 30

Madsen v. Kinsella, 343 U.S. 341 (1952)..... 18, 26

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 4

Ex parte McCardle, 74 U.S. (7 Wall.) 506 (1869) 8, 9, 30

Milch v. United States, 332 U.S. 789 (1947)..... 12

Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866) 6, 7, 28

Neely v. Henkel, 180 U.S. 109 (1901)..... 10, 29, 34

O'Callahan v. Parker, 395 U.S. 258 (1969) 18

Padilla v. Hanft, 547 U.S. 1062 (2006)..... 31

TABLE OF AUTHORITIES—Continued

Page

Ex parte Quirin, 317 U.S. 1 (1942) 10, 11, 28

Rasul v. Bush, 542 U.S. 466 (2004) .....*passim*

Reid v. Covert, 354 U.S. 1 (1957) 17, 18, 26, 28, 33

Rumsfeld v. Padilla, 542 U.S. 426 (2004)..... 20, 21

Solorio v. United States, 483 U.S. 435 (1987) 18

United States ex rel. Toth v. Quarles,
350 U.S. 11 (1955) 16, 28, 33

Ex parte Vallandigham, 68 U.S. (1 Wall.)
243 (1864) 6, 28, 30

Wales v. Whitney, 114 U.S. 564 (1885) 19, 20

Wilson v. Girard, 354 U.S. 524
(1957) .....*passim*

In re Yamashita, 327 U.S. 1 (1946)..... 11, 28, 32

Ex parte Yerger, 75 U.S. (8 Wall.)
85 (1869) 8, 9, 28, 30

Constitutions, Statutes & Rules

U.S. Const., art. III, § 2, cl. 2 5

28 U.S.C. § 452 13

28 U.S.C. § 2241 .....*passim*

TABLE OF AUTHORITIES—Continued

Page

Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385 8

Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44 8

Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73 4

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 22

Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 21

Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 22

Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 27

Proclamation of Sept. 24, 1862, 13 Stat. 730 5

Other Authorities

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TABLE OF AUTHORITIES—Continued

Page

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Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961 (1998) 24

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (2001) 15, 24

INTEREST OF *AMICI CURIAE*[1]

Amici curiae listed in Appendix A are professors of constitutional law and of the federal courts. *Amici* hold different views on many issues related to federal courts jurisprudence as well as the theories and interpretive practices of constitutional law. Nevertheless, they share a commitment to understanding the application of this Court's precedents to contemporary questions regarding the scope of habeas corpus jurisdiction.

SUMMARY OF ARGUMENT

In the courts below, the habeas petitioners, acting as next friends for Shawqi Omar and Mohammad Munaf, and the responding federal parties debated the availability of federal habeas jurisdiction. In particular, the federal parties argued that the World War II-era decision in *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), governs the threshold question of jurisdiction and bars the habeas petitioners from access to the federal courts. In response, Omar and Munaf contended that *Hirota* presents a wholly distinguishable procedural and factual context that does not require denial of jurisdiction, as they

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

Amici thank University of Texas School of Law students Joe Conley and David Currie for research assistance.

alleged that they are detainees "in custody under or by color of the authority of the United States"; and their detention is "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(1), (3).

In this brief, *amici* review the case law of this Court on the availability of jurisdiction when individuals allege wrongful detention by the federal executive. *Amici* focus on explaining when, under the Court's existing precedents, federal habeas jurisdiction is available to consider a petitioner's claims, and do not address questions about the scope of review or forms of relief.[2]

Part I provides a chronological review of how the question of habeas jurisdiction has been framed and decided by this Court in prior cases and identifies the relevant factors affecting the jurisdictional analysis. Drawing upon these precedents, Part II specifies several factors that have been central to this Court's determinations concerning jurisdiction in habeas cases, including: (1) the status of the detainee (e.g., U.S. citizen or foreign national, civilian or enemy); (2) the location of the detention and of the custodian; (3) the source of the authority for detention (including the kind and nature of the tribunal, court or person authorizing

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[2] For a discussion of this Court's cases that inform the standard of review on the merits of a habeas petition, see, for example, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2095-2108 (2007).

detention); (4) the court in which the petitioner initiated the habeas petition; and (5) the statutory or constitutional jurisdictional predicates relied upon.

In Part III, *amici* show how the factors delineated in Part II would be expected to preclude federal jurisdiction in *Hirota* but would require it here. Specifically, in *Hirota*, the petitioners were foreign nationals who had been detained outside of the territorial United States pursuant to the final judgment and sentence of an apparently properly constituted international military tribunal. They sought to attack that judgment and sentence through an original application to the Supreme Court for a writ of habeas corpus. This Court denied their petitions, holding that "[u]nder the foregoing circumstances the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed . . . ." 338 U.S. at 198. In contrast, Omar and Munaf are American citizens held by U.S. forces; they challenge their detention by the United States, and they initiated their request for habeas review in the lower federal courts before any final judgment had been entered in any other court. Under these circumstances, the Court's federal detention jurisprudence supports the exercise of habeas jurisdiction.

When this Court's precedents are read together, it becomes plain that no single decision—including *Hirota*—has directly addressed the specific factual and procedural circumstances presented by Omar and Munaf. Collectively, however, the prior rulings demonstrate that on the facts alleged, Omar

and Munaf fit comfortably within the group of habeas petitioners who may invoke federal court jurisdiction. Indeed, it would be a departure from this Court's habeas precedents to conclude otherwise.

ARGUMENT

I. Two Centuries of the Writ of Habeas Corpus

Throughout our nation's history, the federal courts have identified circumstances in which habeas jurisdiction may be invoked in cases involving federal executive detention. Surveying those cases, Part I.A describes the development of the Court's habeas jurisprudence from its beginnings in the nineteenth century through the Civil War to the early twentieth century. Part I.B explores the Court's relevant habeas decisions in the World War II era. Part I.C reviews the Court's habeas rulings over the course of the last fifty years, including the Court's post-September 11, 2001 decisions addressing the detention of citizens and foreign nationals.

A. The Nineteenth Century

The Judiciary Act of 1789 (the "Judiciary Act") directly empowered the Court to issue writs of habeas corpus, *see* Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 73, 81-82, but the Court's decision in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), that the Judiciary Act could not expand the Court's Article III original jurisdiction to issue writs of mandamus, called the statutory grant into question. In *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), the

Court decided that, under the circumstances presented, it could constitutionally exercise jurisdiction to issue habeas writs. The petitioners in *Bollman* sought original habeas relief from the Supreme Court under § 14 of the Judiciary Act after a federal circuit court ordered them imprisoned pending trial for treason. 8 U.S. (4 Cranch) at 108-23, 135-36. Chief Justice Marshall's opinion for the Court held that the Judiciary Act's habeas grant came within the Court's appellate jurisdiction, U.S. Const. art. III, § 2, cl. 2, because the writ "is the revision of a decision of an inferior court, by which a citizen has been committed to jail." *Bollman*, 8 U.S. (4 Cranch) at 101.[3]

During the Civil War and after, the Court ruled on several additional cases raising issues about its habeas jurisdiction and the scope of habeas review. Given that President Lincoln had ordered military trials for "all rebels and insurgents, their aiders and abettors within the United States" and others alleged to have impeded the Union's war efforts and had also suspended the writ of habeas corpus for such prisoners, *see* Proclamation of Sept. 24, 1862, 13 Stat. 730, many of these cases concerned the jurisdiction of the federal courts to hear challenges to the proceedings and judgments of military commissions.

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[3] Analyses have been put forth suggesting that the Court could have held otherwise. *See, e.g.*, Steven G. Calabresi & Gary Lawson, *The Unitary Executive, Jurisdiction Stripping, and the* Hamdan *Opinions: A Textualist Response to Justice Scalia*, 107 Colum. L. Rev. 1002, 1036-42 (2007).

In *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1864), in response to an application for review through common law certiorari, the Court held that it had no jurisdiction to review the proceedings of a military commission. There, an Ohio citizen was tried, convicted and sentenced by military commission for publicly sympathizing with the Confederacy. *Id.* at 243-47. The judgment was approved by General Burnside, commander of the military department of Ohio. *Id.* at 247-48. The Court ruled that "the authority to be exercised by a military commission is [not] judicial," and that the military commission was not a lower court. *Id.* at 253. Because the Supreme Court previously had defined its constitutional appellate power to be the revision of a lower court's decision, *see Bollman*, 8 U.S. (4 Cranch) at 101, the Court concluded that, absent an intervening lower court decision, it could neither directly review nor issue a writ of habeas corpus as to the military commission's proceedings. *See Vallandigham*, 68 U.S. (1 Wall.) at 253.

But shortly after the Civil War ended, the Court determined in *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), that there were circumstances in which it had Article III appellate jurisdiction to review a habeas petition challenging detention pursuant to a military commission's judgment after that detention was first reviewed by a lower federal court. Milligan, a citizen of Indiana, was charged with conspiring against the United States. *Id.* at 6-7, 107. Although federal and state courts continued to function in Indiana throughout the Civil War, *id.* at 121-22, 126-27, Milligan was tried there by military commission and sentenced to death, *id.* at

107. Milligan then sought habeas review in the federal circuit court, which divided over his claims and certified them to the Supreme Court. *Id.* at 108-12.

The Court exercised jurisdiction over Milligan's claims, confirming that, in the posture of reviewing the circuit court's certification, the Court had both statutory and Article III appellate jurisdiction. *See id.* at 114, 118. The *Milligan* Court also addressed the scope of habeas review that the federal courts could give to a military commission's sentence. Before the Civil War, the Court had held that because a court-martial is not a true court, its sentence "is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever," unless the court-martial lacked jurisdiction over the case or "failed to observe the rules prescribed by the statute for . . . exercise [of its jurisdiction]." *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 81 (1858). Consistent with *Dynes*, the Court observed in *Milligan* that the "controlling question" was whether the military commission had "*jurisdiction*, legally, to try and sentence [Milligan.]" 71 U.S. (4 Wall.) at 118. It then construed the meaning of a jurisdictional challenge broadly to permit consideration of Milligan's constitutional claims under the Fourth, Fifth and Sixth Amendments, and held that the commission had no jurisdiction to try him because "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 127.

After *Milligan*, this Court adhered to the view that it could use habeas writs to inquire into the

jurisdiction of military commissions, so long as a lower federal court had first passed on the issue. In *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869), the Court addressed an appeal from a circuit court's order denying the petitioner habeas relief on the merits and remanding him to federal military custody to await trial by military commission. *Id.* at 508. While McCardle's case was pending in this Court, Congress repealed the portion of the 1867 statute that authorized his appeal. *Id.* at 508-09.[4] The Supreme Court held that the repeal deprived it of statutory authority to hear McCardle's appeal, *id.* at 514, but the Court stated that the repeal did "not affect the jurisdiction which was previously exercised" by the Supreme Court in habeas cases, *id.* at 515. The Supreme Court confirmed this in *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869), holding that "in all cases where" a federal circuit court "caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken," the Supreme Court has appellate jurisdiction to issue an original writ of habeas corpus under the Judiciary Act to "revise the decision of the Circuit Court, and if

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[4] The 1867 act authorized federal judges "to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385. In 1868 however, Congress enacted a law repealing "so much of" the 1867 act "as authorizes an appeal from the judgment of the circuit court to the Supreme Court" in habeas cases. Act of Mar. 27, 1868, ch. 34, § 2, 15 Stat. 44.

it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded." *Id.* at 103. The Court explained that Congress's repeal of the 1867 statute at issue in *McCardle* did not specifically repeal the Court's jurisdiction under the Judiciary Act, and would not be interpreted as doing so, since "[r]epeals by implication are not favored." *Id.* at 105.

The Court's nineteenth century cases also addressed the availability of habeas review in extradition proceedings for both U.S. citizens and foreign nationals. In those cases, the Court did not question the general availability of habeas relief to foreigners challenging detention by the federal government in the United States. Thus, in *In re Kaine*, 55 U.S. (14 How.) 103 (1852) (plurality), where the petitioner was an Irish citizen imprisoned pending extradition on attempted murder charges, *id.* at 103-04, 108-09 (plurality), seven Justices of this Court agreed that the Supreme Court had jurisdiction to issue the writ, *see Yerger*, 75 U.S. (8 Wall.) at 100 (discussing *Kaine*). Although the Court ultimately denied relief "on the merits," *Kaine*, 55 U.S. (14 How.) at 117 (plurality), a plurality of the Court observed that "a foreign criminal . . . has every benefit of the writ of *habeas corpus*[,]" *id.* at 114 (plurality). Three dissenting Justices also believed there was jurisdiction, *id.* at 134-36 , 148 (dissenting ops.), observing that "under our system of laws and principles of government, so far as respects personal security and personal freedom," there is "no distinction between the citizen and the alien who has sought asylum under them," *id.* at 141 (Nelson, J., dissenting).

Later in *Neely v. Henkel*, 180 U.S. 109 (1901), the Court entertained the habeas petition of a U.S. citizen detained in the United States for extradition to Cuba to face embezzlement charges. *Id.* at 112-15. The Court there held that the petitioner was not entitled to habeas relief just because Cuban law did not afford him all the procedural protections of the Constitution. *Id.* at 122. His citizenship "d[id] not . . . entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled," unless a treaty so provided. *Id.* at 123. The Court noted, however, that the governing statute guaranteed that the person subject to extradition would receive a "fair and impartial trial." *Id.* Further, the Court stated that the trial the prisoner received must be "without discrimination against the accused because of his American citizenship." *Id.*

B. The Second World War

The United States' involvement in the Second World War and its resulting global presence brought additional habeas issues before the Court. In *Ex parte Quirin*, 317 U.S. 1 (1942), the Court described how would-be saboteurs (several Germans and one alleged U.S. citizen) were captured in the United States and tried by a U.S. military tribunal in the United States for violating the law of war. *Id.* at 20-23. The Court affirmed the district court's exercise of habeas jurisdiction to consider whether the "petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Id.* at 24-

25. The Court concluded that the military tribunal had jurisdiction, and that the petitioners were not entitled to trial in the civil courts because they were charged with being unlawful enemy combatants. *Id.* at 29-46 (distinguishing *Milligan* on this ground).

Following *Quirin*, in *In re Yamashita*, 327 U.S. 1 (1946), the Court reached the merits of the habeas petition of a Japanese general who surrendered to U.S. forces in the Philippines (then a U.S. territory), and was sentenced to death for war crimes by a U.S. military tribunal in the Philippines. *Id.* at 5, 9. After the Supreme Court of the Philippines rejected his habeas petition on the merits, Yamashita applied to this Court for both an original writ of habeas corpus and a writ of certiorari. *Id.* at 4, 6-7. The Court declined to grant either writ, finding that the military tribunal was lawfully authorized despite being convened after hostilities with Japan had ended. *Id.* at 9-26.

Yamashita's petition, which in part sought to invoke this Court's original jurisdiction, started a trend of original habeas applications to the Supreme Court from detainees tried by U.S. or international military tribunals abroad. Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 316 (5th ed. 2003). Initially, a divided Court summarily dismissed these petitions, although the dismissal orders reflected some disagreement among the Justices as to whether the Court should hear argument on the question of jurisdiction. *See, e.g.*, *Ex parte Betz*, 329 U.S. 672 (1946) (mem.) (denying leave to file "for want of original jurisdiction," with Justices Black and

Rutledge of the view that the motion "should be denied without prejudice to it being filed in the appropriate District Court" and Justice Murphy wishing to hear oral argument); *Everett ex rel. Bersin v. Truman*, 334 U.S. 824 (1948) (mem.) (denying leave, with a four-to-four disagreement among the Justices about whether to hear the case); *see also Milch v. United States*, 332 U.S. 789 (1947) (mem.) (denying leave, with Justices Black, Douglas, Murphy, and Rutledge "of the opinion that the petition should be set for hearing on the question of the jurisdiction of this Court").

In *Hirota v. MacArthur*, 338 U.S. 197 (1948) (per curiam), the Court was again faced with applications for leave to file original petitions. *See id.* at 198. Unlike the previous cases, the Court elected to hear oral argument and issued a brief per curiam opinion. As the Court explained, "[t]he petitioners, all residents and citizens of Japan, [were] held in custody pursuant to the judgments of a military tribunal in Japan." *Id.* The petitioners "filed motions in this Court for leave to file petitions for habeas corpus." *Id.* The Court then stated that it was "satisfied that the tribunal sentencing these petitioners is not a tribunal of the United States," and that the tribunal was established by General Douglas MacArthur acting "as the agent of the Allied Powers." *Id.* "Under the foregoing circumstances," the Court explained, "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners . . . ." *Id.* Concurring in the judgment, Justice Douglas questioned whether *Hirota*'s holding could properly be applied to a U.S.

citizen. *See* 338 U.S. at 205 (Douglas, J., concurring) ("I cannot believe that we would adhere to [the majority's] formula if these petitioners were American citizens.").

After *Hirota*, the Court continued its practice of denying leave to file petitions for original writs. Thus, in *In re Bush*, 336 U.S. 971 (1949) (mem.), where a U.S. citizen—criminally convicted by a U.S. provost court in Japan—sought leave to file an original petition, the Court denied the motion but did so "without prejudice to the right to apply to any appropriate court that may have jurisdiction." *Id.* at 971.

The Court also faced cases challenging the district courts' statutory jurisdiction to issue habeas writs "within their respective jurisdictions" absent the physical presence of the petitioner or of the custodian. *See* 28 U.S.C. § 452 (1940) (current version at 28 U.S.C. § 2241(a) (1970)). In *Ahrens v. Clark*, 335 U.S. 188 (1948), the Court considered petitions filed in the D.C. district court by 120 German enemy aliens detained at Ellis Island, New York, under an order of removal from the U.S. Attorney General. *Id.* at 189. The Court concluded that statutory jurisdiction was lacking because the detainees were never within the D.C. district court's jurisdiction, and it was "not sufficient . . . that the jailer or custodian alone be found in the jurisdiction." *Id.* at 190. Although the Court reserved the question whether its holding applied to "a person confined in an area not subject to the jurisdiction of any district court," *id.* at 192 n.4, the dissent contended that the majority implicitly held that it did, *id.* at 195-96

(Rutledge, J., dissenting) (asking, "is there to be no remedy, even though it is American citizens who are wrongfully deprived of their liberty and Americans answerable to no other power who deprive them of it . . . ?").

As Justice Rutledge, dissenting in *Ahrens*, and Justice Douglas, concurring in *Hirota*, highlighted, the detainee's citizenship has been an important element of the jurisdictional calculus. In *Johnson v. Eisentrager*, 339 U.S. 763 (1950), the Court refused to hear the petitions of 21 German citizens, alleged to be enemy combatants, detained in Germany by the U.S. Army pursuant to convictions for violating the laws of war by a U.S. military tribunal convened in China. *Id.* at 765-66, 790-91. Citing *Ahrens*, the district court had rejected the petitions for lack of statutory jurisdiction. However, the court of appeals reversed, reasoning that, even if, under *Ahrens*, statutory jurisdiction was not specifically provided, foreign nationals enjoyed constitutional rights and therefore the writ ought to be available when such rights were violated. *Eisentrager v. Forrestal*, 174 F.2d 961, 963-65 (D.C. Cir. 1949), *rev'd sub nom. Johnson v. Eisentrager*, 339 U.S. 763 (1950).

The Supreme Court reversed the D.C. Circuit but not on *Ahrens* grounds. Rather the Court held that enemy aliens who had no relationship with the United States had "no basis for invoking federal judicial power in any district" in the first place. *Eisentrager*, 339 U.S. at 790. The Court explained that the petitioners, who had been convicted in China and detained in Germany, were not "entitled, as a constitutional right, to sue in some court of the

United States for a writ of habeas corpus." *Id.* at 768-77. The Court contrasted the status of those foreign nationals with those who enjoyed the "high privilege" of citizenship. *Id.* at 770. "Citizenship as a head of jurisdiction and a ground of protection was old when Paul invoked it in his appeal to Caesar," the Court explained. "The years have not . . . sapped the vitality of a citizen's claims upon his government for protection." *Id.* at 769-70.[5]

Although the *Eisentrager* Court had no occasion to address whether U.S. citizens detained abroad were statutorily barred from invoking federal habeas jurisdiction under *Ahrens*, two later decisions implicitly answered the question by invoking such habeas jurisdiction as to U.S. citizens. In *Burns v. Wilson*, 346 U.S. 137 (1953) (plurality), the Court heard appeals from habeas petitions filed by two U.S. soldiers in the D.C. district court challenging their court-martial convictions in Guam and their subsequent detention in Japan. *Id.* at 138-39; *Burns v. Wilson*, 346 U.S. 844, 851 (1953) (Frankfurter, J., dissenting from the denial of rehearing). Although the Court found that "[t]he federal civil courts have jurisdiction over" habeas petitions alleging imprisonment and sentencing in violation of the

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[5] On a view that habeas is not solely a means of vindicating individual rights but also a means of enforcing the structural restraints imposed by the Constitution on the government's conduct, *Eisentrager* may have been wrong to distinguish between citizens and foreign nationals. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1, 19, 25 (2001).

Constitution, *Burns*, 346 U.S. at 139 & n.1 (citing § 2241 and *Yamashita*), it denied the writs on their merits, holding that the courts-martial gave adequate consideration to the petitioners' claims, *id.* at 146. Dissenting from the Court's subsequent denial of a rehearing, Justice Frankfurter objected that the Court overlooked the statutory jurisdictional issue, reserved in both *Ahrens* and *Eisentrager*, but squarely presented in *Burns*: "whether an American citizen detained by federal officers outside of any federal judicial district," here, in Japan, "may maintain habeas corpus directed against the official superior of the officers actually having him in custody." *Burns*, 346 U.S. at 851-52 (Frankfurter, J., dissenting).

Soon thereafter, in *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court again reached the merits of a habeas petition filed by a U.S. citizen detained abroad. Toth, an ex-serviceman in the Korean War, was arrested in the United States and returned to Korea, where he was convicted by a U.S. court-martial of murder. *Id.* at 13. While imprisoned in Korea, he petitioned the D.C. district court for a writ of habeas corpus. *Id.* at 13 n.3. On appeal, the Supreme Court granted the writ, holding that Congress could not "subject civilians like Toth to trial by court-martial." *Id.* at 23. The Court never questioned whether it had habeas jurisdiction, notwithstanding Justice Frankfurter's *Burns* dissent just two years earlier. *See* Fallon & Meltzer, *supra* note 2, at 2054; *see also Ex parte Hayes*, 414 U.S. 1327, 1328-29 (1973) (Douglas, Circuit Justice) (asserting that *Burns* and *Toth* decided "sub silentio and by fiat, that at least a citizen held abroad by

federal authorities has access to the writ in the District of Columbia").

Consistent with these decisions, the Court recognized in *Reid v. Covert*, 354 U.S. 1 (1957) (plurality), "that citizens retain constitutional rights even when tried abroad by a military tribunal." Fallon & Meltzer, *supra* note 2, at 2054.[6] In *Reid*, the Court heard the habeas petition of a U.S. civilian convicted by a U.S. court-martial in England of murdering her U.S. serviceman-husband and subsequently imprisoned in the United States. 354 U.S. at 3-4. The government argued that although that proceeding had not included a jury, jurisdiction was proper pursuant to an agreement with Great Britain permitting the United States "to exercise exclusive jurisdiction over offenses committed in Great Britain by American servicemen or their dependents." *Id.* at 15 & n.29. The Court disagreed and ruled that the military did not have jurisdiction to try civilians. *Id.* at 40-41. Justice Black's plurality opinion rejected "the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights," *id.* at 5, and explained

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[6] As Professors Fallon and Meltzer have observed, "[i]f the Constitution demands that some court have jurisdiction to hear constitutional claims asserted by citizens subject to executive detention," then the decisions in *Burns* and *Toth* "were not merely statutory adjustments but performed a deeper function of avoiding the serious constitutional question that a contrary ruling would have raised." Fallon & Meltzer, *supra* note 2, at 2054.

that "under our Constitution courts of law alone are given power to try civilians," *id.* at 40.[7]

Two other decisions of this Court are relevant to the availability of habeas jurisdiction specifically for U.S. citizens abroad. Both involved detention based upon a relationship to international authority. In *Madsen v. Kinsella*, 343 U.S. 341 (1952), a U.S. civilian in U.S.-occupied Germany was convicted of murder by the "United States Court of the Allied High Commission for Germany," a court established by a law passed by the "Allied High Commission." *Id.* at 342-44 & n.3, 370-71. After being imprisoned in West Virginia, she petitioned the district court there for habeas corpus. *Id.* at 343, 345. On appeal, the Court exercised jurisdiction over her petition but denied the writ, finding on the merits that the military commission had the authority to try her. *Id.* at 362.

In *Wilson v. Girard*, 354 U.S. 524 (1957) (per curiam), the Court, without discussing jurisdiction, heard the merits of the habeas petition of a U.S. soldier whom the United States held in Japan pursuant to an indictment by a Japanese court charging that he had killed a Japanese civilian. *Id.* at 525-26. Under a treaty between the two nations,

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[7] While *Reid* held that a U.S. civilian could not constitutionally be tried by court-martial, a member of the U.S. military may be tried by court martial, regardless of whether the offense committed is connected to that member's service to the military. *See Solorio v. United States*, 483 U.S. 435, 436 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)).

the United States agreed to waive its jurisdiction to try Girard and deliver him "to the Japanese authorities for trial." *Id.* at 526-29. However, before the United States could deliver him, Girard filed for a writ with the D.C. district court. *Id.* at 526, 543. The Supreme Court granted certiorari and exercised jurisdiction to deny the writ on the merits, concluding that the treaty validly authorized Japan to exercise jurisdiction. *Id.* at 526-30.

C. From the 1960s to the Present

In 1973, in *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973), the Court revisited its construction of 28 U.S.C. § 2241 in *Ahrens* requiring the physical presence of a petitioner as a predicate to statutory jurisdiction. In *Braden*, a prisoner serving an unrelated sentence in an Alabama prison brought a habeas petition in Kentucky against a detainer issued by a Kentucky court. *Id.* at 485-87. The Supreme Court concluded that § 2241's provision for district courts to grant habeas writs "within their respective jurisdictions" need not be read, as it had been in *Ahrens*, to invariably require "the prisoner's presence within the territorial confines of the district . . . ." 410 U.S. at 495. Rather, jurisdiction was proper in the Kentucky district court because the writ of habeas corpus "does not act upon the prisoner who seeks relief, but upon the person who holds him in what is alleged to be unlawful custody." *Id.* at 494-95 (citing *Wales v. Whitney*, 114 U.S. 564, 574 (1885)).

In light of intervening congressional and jurisprudential developments, the *Braden* Court

concluded that traditional principles of venue would alleviate the forum-shopping concerns that animated the *Ahrens* decision and that the Court could "no longer view that decision as establishing an inflexible jurisdictional rule, dictating the choice of an inconvenient forum even in a class of cases which could not have been foreseen at the time of our decision." *Id.* at 499-500. Among the jurisprudential developments cited in *Braden* were the Court's decisions involving American habeas petitioners in custody outside of the United States (and the territory of any federal district court) where the Court "held, if only implicitly, that the petitioners' absence from the district does not present a jurisdictional obstacle to the consideration of the claim." *Id.* at 498 (citations omitted).

This Court's more recent decision in *Rumsfeld v. Padilla*, 542 U.S. 426 (2004), reaffirmed the "immediate custodian" rule of *Wales*, which interpreted the provisions of the habeas statute then applicable as contemplating "'a proceeding against some person who has the *immediate custody* of the party detained . . . .'" *Id.* at 435 (quoting *Wales*, 114 U.S. at 574). In particular, *Padilla* recognized that in "core challenges" to present, physical confinement (as distinct from the type of challenge at issue in *Braden*), a habeas petitioner must name his "immediate custodian"—and not some distant official or abstract entity—as his respondent. *Id.* at 436, 438-39. Nevertheless, the *Padilla* Court noted that jurisdiction for those outside the United States posed a different issue: "We have long implicitly recognized an exception to the immediate custodian rule in the military context where an American

citizen is detained outside the territorial jurisdiction of any district court." *Id.* at 436 n.9.

In *Rasul v. Bush*, 542 U.S. 466 (2004), decided the same day as *Padilla*, the Court held that non-citizens detained by the U.S. military at the Guantánamo Bay Naval Base ("Guantánamo") in Cuba were able to invoke the statutory jurisdiction of the federal courts. *Id.* at 470-71, 485. The *Rasul* petitioners were foreign nationals captured abroad and held as "enemy combatants" by U.S. military forces at Guantánamo—"a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'" *Id.* at 475 (footnote omitted). Because *Braden* "overruled the statutory predicate to *Eisentrager's* holding"—namely, the *Ahrens* Court's construction of the habeas statute—the Court reasoned that "*Eisentrager* plainly does not preclude the exercise of § 2241 jurisdiction over petitioners' claims." *Id.* at 479 (footnote omitted). Further, the Court concluded that because the habeas statute does not distinguish between American citizens and foreign nationals held in federal custody and because the respondents in *Rasul* conceded that the habeas statute would create jurisdiction for the claims of an American citizen held at Guantánamo, "[a]liens held at the base, no less than American citizens, are entitled to invoke the federal courts' authority under § 2241." *Id.* at 481; *cf. Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2769 n.15 (2006) (exercising the jurisdiction upheld in *Rasul* over petitions of non-citizens detained by U.S. forces in Guantánamo and holding, *inter alia*, that the Detainee Treatment Act of 2005, Pub. L. 109-148, 119 Stat. 2739 (the "DTA"), did not deprive

federal courts of jurisdiction to hear the previously pending habeas petition of a foreign national held as an "enemy combatant" at Guantánamo).

As efforts to combat terrorism and illegal immigration increasingly occupied Congress in the 1990s and following the events of September 11, 2001, the Court addressed several legislative amendments to the habeas statute, seeking to reconcile those amendments with the requirements of the Suspension Clause. For example, in the summer of 2001, the Court held in *INS v. St. Cyr*, 533 U.S. 289 (2001), that neither the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, nor the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546, deprived federal courts of jurisdiction to review under § 2241 the habeas petition of a permanent resident alien challenging aspects of his removal proceedings. 533 U.S. at 293, 297, 314. The Court explained that the writ "has always been available to review the legality of Executive detention," *id.* at 305 (collecting cases), and habeas jurisdiction has been "regularly invoked on behalf of noncitizens, particularly in the immigration context," *id.* (citations omitted). The Court declined to construe the amendments as precluding habeas jurisdiction in possible contravention of the Suspension Clause, because doing so "would give rise to substantial constitutional questions." *Id.* at 300.

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality), the Court considered the legality of the Government's detention of indefinite duration of a

U.S. citizen as an "enemy combatant," where the detainee had been seized abroad before being transferred to Guantánamo and then to a naval facility within the United States. *Id.* at 509-10. A majority of Justices agreed with the respondent that Congress had sanctioned the detention in question under 2001 legislation. *Id.* at 517 (plurality); *id.* at 587 (Thomas, J., dissenting). A different majority concluded that such authorization did not preclude judicial review of the detention. *Id.* at 536-37 (plurality); *id.* at 553 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment). As Justice O'Connor stated, any threats to military operations posed by independent review did not trump "a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Id.* at 535 (plurality). Absent suspension of the habeas corpus writ, "a citizen detained as an enemy combatant is entitled to this process." *Id.* at 537 (plurality). While disagreement existed as to the appropriate scope and nature of any habeas review, it was thus undisputed by the parties—and by a majority of the Court—that the federal courts had jurisdiction to hear the habeas petition. *See id.* at 525 (plurality); *id.* at 541 (Souter, J., concurring in part, dissenting in part, and concurring in the judgment).

II. This Court's Jurisprudence Identifies Key Factors That Affect the Availability of Habeas Corpus

Read together, the cases surveyed in Part I demonstrate that this Court has considered a variety of factors relevant in determining whether the writ

of habeas corpus and accompanying relief are available in specific cases of federal executive detention: (1) the status of the detainee (e.g., U.S. citizen or foreign national, civilian or enemy); (2) the location of the detention and of the custodian; (3) the source of the authority for detention (including the kind and nature of the tribunal, court or person authorizing detention); (4) the court in which the petitioner initiated the habeas petition; and (5) the statutory or constitutional jurisdictional predicates upon which the petitioner relied.

The Court has not focused on the same factors in every case nor always weighted all factors equally. Moreover, the Court has not addressed these factors using the same interpretive methodology in every case. At times, the decisions can be read to rely on textualism, whereas other decisions focus more on the common law history of the writ, its function as a structural restraint on the government's conduct, or the writ's fundamental purposes.[8] Taken as a whole, the Court's jurisprudence indicates that the Court has consistently relied upon the intersection of different factors, and not upon any one factor alone, in deciding whether to exercise its habeas jurisdiction in each case.

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[8] *See, e.g.*, William F. Duker, *A Constitutional History of Habeas Corpus* 225-86 (1980); Calabresi & Lawson, *supra* note 3, at 1003-09; Paust, *supra* note 5, at 19, 25; Gerald L. Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 Colum. L. Rev. 961, 981-91 (1998).

A. Status of the Detainee in Correlation with Other Key Factors

A number of this Court's habeas decisions can best be understood in light of the interaction between the petitioner's citizenship status and the location of his or her detention. When petitioners are held within the territorial jurisdiction of the United States, the Court has exercised its habeas jurisdiction to review the detentions of both citizens and foreign nationals. *See Hamdi*, 542 U.S. at 525 (plurality); *see also, e.g.*, *St. Cyr*, 533 U.S. at 314; *Kaine*, 55 U.S. (14 How.) at 117 (plurality). However, some of this Court's post-World War II decisions indicate that when petitioners are detained abroad, the availability of habeas relief may be more expansive for Americans than for foreigners. *See, e.g.*, *Rasul*, 542 U.S. at 497 (Scalia, J., dissenting) ("The constitutional doubt that the Court of Appeals in *Eisentrager* had erroneously attributed to the lack of habeas for an alien abroad might indeed exist with regard to a *citizen* abroad—justifying a strained construction of the habeas statute, or (more honestly) a determination of constitutional right to habeas.").

Other decisions involved a confluence of factors including citizenship status, location, and the source of authority for detention. For example, in a number of cases in which citizens challenged confinement abroad, the Court reached the merits of their habeas petitions without questioning its own or the lower federal courts' jurisdiction to do so. This was so whether the challenged detentions were authorized by purely U.S. authority, *see Burns*, 346 U.S. at 138-39 (plurality), purely foreign authority,

see Wilson, 354 U.S. at 526-529, or by agreement with other nations, *see, e.g.*, *Reid*, 354 U.S. at 15 & n.29, 41 (plurality); *cf. Madsen*, 343 U.S. at 344 & n.3, 370-71.

In other cases, a different group of factors—citizenship status and the basis of jurisdiction invoked—was considered by the Court in determining whether to issue the writ. For example, when U.S. citizens have sought an original writ from this Court without previously filing in a lower court, the Court has declined to entertain their petitions. *See, e.g.*, *Bush*, 336 U.S. at 971 (denying leave to file an original petition); *Betz*, 329 U.S. at 672 (same).

The Court's case law is less clear about how citizenship status interacts with other factors when non-citizens are held outside the territorial United States. In *Hirota*, the petitioners were foreign nationals held in Japan and were sentenced by an international military tribunal; these were among the "foregoing circumstances" the Court enumerated before holding that "the courts of the United States have no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed" on the petitioners. 338 U.S. at 198. In *Eisentrager*, which expressly precluded habeas corpus for enemy aliens convicted by military tribunals and detained overseas, the Court did not specify whether its holding rested on the petitioners' status as "enemy aliens," their extraterritorial situs, the statutory provisions involved or some combination of all three factors. *See* 339 U.S. at 777. More recently, however, a majority of this Court concluded in *Rasul* that § 2241 reaches even non-

citizens held outside the United States in an area over which the United States exercises plenary but not sovereign control, *see* 542 U.S. at 479.[9]

B. The Source of the Detention Authority

The nature of the authority behind a detention—be it Executive, judicial, military or otherwise—has proved to be an important factor in determining when habeas jurisdiction will be available.

1. Executive Detention Absent Judicial or Military Proceedings

This Court has recognized that, "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *St. Cyr*, 533 U.S. at 301. In particular, the "'historic purpose of the writ has been to relieve detention by executive authorities without judicial trial.'" *Rasul*, 542 U.S. at 474 (quoting *Brown v. Allen*, 344 U.S. 443, 533 (1953) (Jackson, J., concurring)). Thus, for instance,

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[9] Section 7(a) of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, adds an express statutory limit to the habeas corpus jurisdiction of the United States in cases brought by certain non-citizens detained as "enemy combatants," or awaiting such determination. The constitutionality of this provision as applied to non-citizens held at Guantánamo is presently before this Court in *Boumediene v. Bush* and *Al Odah v. United States*, Nos. 06-1195, 06-1196 (U.S. argued Dec. 5, 2007).

foreign nationals in *Rasul* and a U.S. citizen in *Hamdi* were detained without trial by the U.S. military and were permitted to invoke federal habeas jurisdiction to challenge their detention. *See Hamdi*, 542 U.S. at 509-11; *Rasul*, 542 U.S. at 470-71, 485.

2. Military Tribunals

By the close of the Civil War, it had become clear that the habeas writ could be used to challenge detentions pursuant to the convictions of military tribunals. *See, e.g.*, *Yerger*, 75 U.S. (8 Wall.) at 103; *Milligan*, 71 U.S. (4 Wall.) at 118. A military tribunal's jurisdiction and compliance with statutory procedures may be reviewed by the federal courts. *See, e.g.*, *Milligan*, 71 U.S. (4 Wall.) at 118-27; *see also Reid*, 354 U.S. at 40-41 (plurality); *Quirin*, 317 U.S. at 24-25. Further, convictions do not bar habeas jurisdiction; indeed, this Court has, on habeas review, granted post-conviction relief to American citizens convicted by U.S. military tribunals abroad on the ground that the proceedings before those tribunals were unconstitutional. *See Reid*, 354 U.S. at 3-5; *Toth*, 350 U.S. at 13-14 n.3, 23. Thus far, however, absent statutory authorization, military tribunals' judgments and sentences have not been susceptible to direct review. *See, e.g.*, *Burns*, 346 U.S. at 139-40 (plurality); *Yamashita*, 327 U.S. at 8-9; *Vallandigham*, 68 U.S. (1 Wall.) at 253; *Dynes*, 61 U.S. (20 How.) at 81.

3. Foreign Tribunals

While this Court has seldom grappled with the federal courts' authority to review decisions of foreign or international tribunals—either in advance of any actual proceedings or, less frequently, after decision—the Court has sometimes recognized limits on the challenges that may be presented to the proceedings of such courts. For example, this Court has held that where extradition is contemplated pursuant to a congressionally implemented treaty and unless the treaty provided otherwise, a petitioner (even one who is a U.S. citizen) could not challenge his surrender for trial under foreign law on the basis that the foreign proceedings will not guarantee him the same procedural protections as the Constitution. *Neely*, 180 U.S. at 123; *see also, e.g.*, *Wilson*, 354 U.S. at 529-30. *Neely*, however, indicates that there may be procedural requirements with which the foreign proceedings must comply in order for such a transfer to be validated. *See* 180 U.S. at 123. Given the development in due process decisions since that ruling, individuals detained in U.S. custody may be able to seek habeas review prior to their transfer to the custody of other nations where they could be subjected to grave forms of injury.

What this Court's decisions have established thus far is that a petitioner, whether or not a citizen, may use habeas to challenge the constitutional validity of the statutory scheme pursuant to which he is being transferred to foreign authorities, and to ensure that the transfer proceedings themselves and any U.S. detention prior to transfer are authorized

by statute. *See Kaine*, 55 U.S. (14 How.) at 103-04, 108-09 (plurality).

C. Statutory and Constitutional Predicates for Habeas Jurisdiction

In cases from *McCardle* and *Yerger* in the nineteenth century to *Rasul* in the twenty-first, this Court has consistently attended to the statutory predicate invoked and to the level of the court in which the habeas petition was first filed in determining whether it has jurisdiction. Successive congressional revisions have impacted these determinations. *Compare, e.g.*, *McCardle*, 74 U.S. (7 Wall.) at 508-14 (no jurisdiction for appeal of lower court's denial of habeas after repeal of 1867 statutory provision), *with Yerger*, 75 U.S. (8 Wall.) at 100-02 (jurisdiction under Judiciary Act for original habeas petition in Supreme Court seeking review of denial of habeas petition in lower court). The Court has not read a repeal of one form of statutory habeas jurisdiction to preclude another, absent a specific directive from Congress. *See, e.g.*, *St. Cyr*, 533 U.S. at 298-99 & n.10.

When petitioners have initiated habeas proceedings in this Court, the Court's construction of its own jurisdiction has also been an important factor. *Compare Bollman*, 8 U.S. (4 Cranch) at 100-01 (appellate jurisdiction for habeas review of lower court's order committing prisoner to jail), *with Vallandigham*, 68 U.S. (1 Wall.) at 251-54 (no jurisdiction, including through habeas, for review of

detention pursuant to military commission sentence on which no lower court had previously passed).[10]

III. Under This Court's Precedents, the Key Factors Barred Habeas Availability in *Hirota* and Require it for Omar and Munaf

The preceding overview shows *Hirota* to be but one of a series of cases that delineate the boundaries of habeas jurisdiction by reference to a combination of key factors. As the Court stated in *Hirota*, its judgment was predicated upon "the foregoing circumstances"; the Court did not indicate that any single factor was dispositive. The combination of these "circumstances" is thus critical to understanding the Court's conclusion that the federal courts had "no power or authority to review, to affirm, set aside or annul the judgments and sentences imposed on these petitioners." 338 U.S. at 198.

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[10] Although this Court has only granted a handful of original habeas petitions since *Yerger* (and none since 1925), it has recognized the continuing availability of such an atypical procedure as recently as last Term. *See, e.g., Boumediene v. Bush*, 127 S. Ct. 1478, 1478 (mem.) (Stevens & Kennedy, JJ., respecting the denial of certiorari) (noting the potential availability of original relief "[i]f petitioners later seek to establish that the Government has unreasonably delayed proceedings under the Detainee Treatment Act of 2005, . . . or some other and ongoing injury" (citation omitted)), *reh'g granted, order vacated by* 127 S. Ct. 3078 (2007); *see also Padilla v. Hanft*, 547 U.S. 1062, 1063 (2006) (mem.) (Kennedy, J., concurring in the denial of certiorari).

The first of the "circumstances" was that the *Hirota* petitioners were not American citizens but foreign nationals. The second was that they were not detained within the territories of the United States. While in and of itself being a foreign national does not prevent a petitioner from seeking a writ of habeas corpus, *see, e.g.*, *St. Cyr*, 533 U.S. at 26, the Court thus far has not permitted aliens held outside the United States or areas over which the United States has plenary control to seek habeas relief, at least when they have no connection to the United States, *see, e.g.*, *Eisentrager*, 339 U.S. at 777-81.

A third "circumstance" was that the *Hirota* petitioners sought to attack their convictions and sentences by an international military tribunal. *Hirota* thus fits within this Court's decisions holding that federal courts do not have habeas jurisdiction to review the judgment of a military tribunal so long as it is properly constituted and has adhered to appropriate procedural rules. *See, e.g.*, *Yamashita*, 327 U.S. at 5-9. Although these rulings involved U.S. military tribunals, their holdings indicate that a federal court would be no less reluctant to review the judgment of a duly constituted foreign or international military tribunal.

A fourth "circumstance" referred to in *Hirota* was that the petitioners filed for an original writ, and therefore were required to satisfy either the Court's original or appellate jurisdiction under Article III, section 2, clause 2. Petitions for original habeas writs were denied by the Court before and

after *Hirota* as a matter of course. *See, e.g.*, *Bush*, 336 U.S. 971 (mem.); *Betz*, 329 U.S. 672 (mem.).

In contrast, the circumstances of Omar and Munaf do not fall within the parameters of *Hirota*. They are instead consistent with cases where the Court has found that habeas jurisdiction exists.

First, Omar and Munaf are American citizens. Joint Appendix ("J.A.") 32, 110-11. The Supreme Court has never held that the federal courts lack jurisdiction to consider the claims presented in a habeas petition of a U.S. citizen detained abroad by the executive. To the contrary, since 1953, the Court has repeatedly approved of the exercise of jurisdiction over the habeas petitions of such Americans. *See, e.g.*, *Reid*, 354 U.S. at 3-4 (plurality); *Toth*, 350 U.S. at 23; *Burns*, 346 U.S. at 146 (plurality).

Second, Omar and Munaf are detained by U.S. forces that are working in conjunction with other nations as a part of the Multinational Force-Iraq ("MNF-I"), whose operations are authorized by a U.N. resolution. J.A. 42-43, 111. In other instances when U.S. citizens held by the U.S. military working with other nations or pursuant to international authority have filed habeas petitions, the Court has exercised jurisdiction to consider those petitions. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Third, Omar and Munaf filed their habeas petitions seeking review of their detention by U.S. forces prior to the judgment of any foreign tribunal. Both remain detained, although Munaf, after filing

for habeas relief, was tried, convicted and sentenced to death by an Iraqi court. *See* J.A. 14, 27-30, 33, 54, 88, 104-06, 111-12. Where, as here, the United States intends to transfer an individual in U.S. custody to a foreign sovereign, the Court's precedents indicate that the individual may properly invoke habeas jurisdiction to challenge that detention and the constitutional and statutory bases for the proposed transfer. *See, e.g.*, *Neely*, 180 U.S. at 123. Whether a foreign court has exercised process over the petitioner after the petition is filed is not relevant to the exercise of habeas jurisdiction. *See, e.g.*, *Wilson*, 354 U.S. at 526-30.

Fourth, neither Omar nor Munaf seek an original writ from this Court; both have duly filed petitions in the D.C. district court, invoking that court's jurisdiction under § 2241. J.A. 27, 104. *Compare Hirota*, 338 U.S. at 198.

CONCLUSION

As set forth above, different combinations of key factors have been central to the Court's determinations concerning jurisdiction in habeas cases. Under the circumstances presented here, Omar and Munaf are among many other habeas petitioners whom this Court's rulings have recognized may invoke the jurisdiction of the federal

courts "to review the legality of Executive detention." *St. Cyr*, 533 U.S. at 305.

Respectfully submitted,

DANIEL F. KOLB
Counsel of Record
BRIAN S. WEINSTEIN
WILLOW D. CRYSTAL
DANIEL J. SCHWARTZ
KEVIN P. HANCOCK
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4000

Attorneys for Amici Curiae

Of Counsel:

JUDITH RESNIK
127 Wall Street
New Haven, Connecticut 06511

STEPHEN I. VLADECK
4801 Massachusetts Avenue, NW
Washington, D.C. 20016

FEBRUARY 2008

APPENDIX A
LIST OF *AMICI CURIAE* PROFESSORS OF CONSTITUTIONAL LAW AND OF THE FEDERAL COURTS*

Bruce Ackerman
Sterling Professor of Law and Political Science
Yale University

Susan Bandes
Distinguished Research Professor
DePaul University College of Law

Robert N. Clinton
Foundation Professor of Law
Sandra Day O'Connor College of Law
Arizona State University

Norman Dorsen
Stokes Professor of Law and
Counselor to the President
New York University

Amanda Frost
Associate Professor of Law
American University College of Law

Sylvia A. Law
Elizabeth K. Dollard Professor of Law, Medicine and Psychiatry
New York University Law School

---

* Affiliations of *amici* are listed for identification purposes only.

Jenny S. Martinez
Associate Professor of Law and
Justin M. Roach, Jr. Faculty Scholar
Stanford Law School

Martha Minow
Jeremiah Smith Jr. Professor
Harvard Law School

Trevor W. Morrison
Associate Professor of Law
Cornell Law School

Edward A. Purcell, Jr.
Joseph Solomon Distinguished Professor
New York Law School

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Lauren Robel
Dean and Val Nolan Professor
Indiana University School of Law

Caprice L. Roberts
Professor of Law
West Virginia University

Kermit Roosevelt
Professor of Law
University of Pennsylvania Law School

Andrew M. Siegel
Associate Professor of Law
Seattle University School of Law

Carl Tobias
Williams Professor
School of Law, University of Richmond

Stephen I. Vladeck
Associate Professor of Law
American University Washington College of Law

Larry Yackle
Basil Yanakakis Faculty Research Scholar
Professor of Law
Boston University School of Law

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IN THE

Supreme Court of the United States

PETE GEREN, SECRETARY OF THE ARMY, ET AL.
Petitioners,

v.

SANDRA K. OMAR & AHMED S. OMAR,
AS NEXT FRIENDS OF SHAWQI AHMAD OMAR
Respondents.

MOHAMMED MUNAF, ET AL.
Petitioners,

v.

PETE GEREN, SECRETARY OF THE ARMY, ET AL.
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE ASSOCIATED PRESS, THE COMMITTEE TO PROTECT JOURNALISTS, THE INTERNATIONAL FEDERATION OF JOURNALISTS, PEN AMERICAN CENTER, AND THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS IN *MUNAF v. GEREN*, No. 06-1666, AND IN SUPPORT OF RESPONDENTS IN *GEREN v. OMAR*, No. 07-394

PAUL M. SMITH*
KENYANNA SCOTT
JOSHUA A. BLOCK
ELISABETH GENN
JENNER & BLOCK LLP
919 Third Avenue,
New York, NY 10022
(212) 891-1600

*Counsel of Record

Attorneys for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
INTEREST OF *AMICI CURIAE* 1
INTRODUCTION AND SUMMARY 2
ARGUMENT 4
I. Journalists and War Correspondents Are Routinely Present in Areas of Military Conflict. 4
II. The Current War in Iraq Has Been Particularly Dangerous for Journalists. 10
III. The Government's Proposed Jurisdictional Rule Would Pose an Unacceptably High Risk of Erroneous Detention in Current and Future Military Conflicts. 14
CONCLUSION 18

TABLE OF AUTHORITIES

Cases

County of Sacramento v. Lewis,
523 U.S. 833 (1998) 14
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339 U.S. 763 (1950) 17
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INTEREST OF *AMICI CURIAE*

The Associated Press ("AP") is the essential global news network, delivering fast, unbiased news from every corner of the world to all media platforms and formats. Founded in 1846, AP today is the largest and most trusted source of independent news and information. On any given day, more than half the world's population sees news from AP.

The Committee to Protect Journalists ("CPJ") is an independent, non-profit organization that promotes press freedom worldwide by defending the right of journalists to report the news without fear of reprisal.

The International Federation of Journalists ("IFJ") is the world's largest organization of journalists, representing around 600,000 members in 120 countries. The IFJ promotes international action to defend press freedom and social justice through strong, free, and independent trade unions of journalists.

PEN American Center ("PEN") is a human rights and literary association based in New York. Committed to the advancement of literature and the unimpeded flow of ideas and information, PEN fights for freedom of expression; advocates on behalf of

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Letters of consent from the parties have been submitted to the Clerk's office along with this brief.

writers harassed, imprisoned, and sometimes killed for their views; and fosters international exchanges, dialogues, discussions, and debates.

The Reporters Committee for Freedom of the Press (the "Reporters Committee") is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance, and research in First Amendment and freedom of information litigation in state and federal courts since 1970.

INTRODUCTION AND SUMMARY

In *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), a coalition of humanitarian organizations and associations of international journalists filed an *amicus* brief in support of petitioner Yaser Hamdi, arguing that "[g]iven the conditions in which relief workers and journalists are forced to operate, they face a real risk of mistaken or ill-founded military detention." *Br. for AmeriCares, et al., Hamdi v. Rumsfeld*, 542 U.S. 547 (2004) (No. 03-6696) *available at* 2004 WL 575744, at *13. Citing that brief, this Court's plurality opinion in *Hamdi* noted that "the risk of erroneous deprivation of a citizen's liberty in the absence of sufficient process here is very real," and held that due process requires, at a minimum, a hearing before a neutral decisionmaker at which "the errant tourist, embedded journalist, or local aid worker has a chance to prove military error." *Hamdi*, 542 U.S. at 530, 534 (plurality opinion).

Amici in this case are media organizations, international journalist associations, and non-governmental organizations dedicated to freedom of the press. Although *Geren v. Omar* and *Munaf v. Geren* arise in a different legal context than *Hamdi*, the practical implications of the Executive's assertion of unreviewable detention authority are the same. Journalists and other civilians are routinely present in areas of military conflict. Indeed, military protocols recognize that journalists will often be on the ground before troops arrive. Similarly, the Geneva Conventions anticipate that journalists will be on or near the battlefield and provide those journalists with protections as civilians or prisoners of war. Reporters and war correspondents thus face a substantial risk of being detained erroneously in the course of executing their professional responsibilities.

The ongoing conflict in Iraq demonstrates that such erroneous detentions are not merely a hypothetical possibility. More journalists have died in the course of carrying out their professional duties in Iraq than during any conflict in the 20th Century. While insurgents, kidnappers, and masked gunmen are largely responsible for the dangers that journalists confront in Iraq, the journalists also face significant risks as a result of mistaken identity. In the fog of war, U.S. troops have sometimes confused journalists with Iraqi insurgents. U.S. forces have detained over a dozen journalists for months at a time without any charges. Many more journalists and media support workers have been detained

without charges for shorter intervals and then released.

In *Hamdi*, this Court recognized the substantial risk of erroneous detention and insisted on due-process protections to preserve "core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator." *Hamdi*, 542 U.S. at 535 (plurality opinion). Yet the government's interpretation of *Hirota v. MacArthur*, 338 U.S. 197 (1948), would eviscerate *Hamdi* and insulate many, if not most, of the military's future detention activities from any judicial review. The government's concerns about deference to military operations and international comity can and should be taken into account in fashioning the scope of the relief available to detainees, but these policy concerns should not be engrafted onto Article III as a rigid jurisdictional bar. A system of unchecked and unreviewable detention would have devastating consequences for the many journalists and other civilians in Iraq and in future areas of military conflict.

ARGUMENT

I. Journalists and War Correspondents Are Routinely Present in Areas of Military Conflict.

As a fixture of modern warfare, journalists and war correspondents will often be present in a foreign theater of war without being "part of or supporting forces hostile to the United States or coalition partners." *Hamdi*, 542 U.S. at 527 (plurality opinion) (quotation marks omitted). The government's claims of unreviewable authority to

detain and punish will have dangerous implications for these journalists reporting from Iraq and from future areas of conflict.

Journalists have reported directly from the battlefield since at least the Crimean War in 1853.[2] By 1909, war correspondents had become such a regular presence in war zones that the regulations annexed to the Hague Conventions incorporated special provisions ensuring their safety.[3] During World War II, about 150 war correspondents landed in Normandy to cover the Allied Forces' D-Day

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[2] *See generally* Philip Knightley, *The First Casualty—The War Correspondent as Hero & Myth-Maker from the Crimea to Iraq* (2004).

[3] *See* Hague Regulations Respecting the Laws and Customs of War on Land, art. 13, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907 (providing that "newspaper correspondents and reporters . . . are entitled to be treated as prisoners of war, provided they are in possession of a certificate from the military authorities of the army which they were accompanying"). In their current form, the protections for war correspondents are codified in Article 4 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 ("Third Geneva Convention"), which protects all authorized war correspondents as prisoners of war, whether or not the correspondent actually possesses an authorization card at the time of capture. Journalists who are unaffiliated with a particular nation's armed forces are protected as civilians under Common Article 3 of the Geneva Conventions and under separate provisions in Additional Protocol I to the Geneva Conventions of 12 August 1949 (1977) ("Protocol 1").

invasion in 1944.[4] For the invasion of Iraq in 2003, that number ballooned to 600 journalists, who worked as embedded reporters with Multi-National Force ("MNF") troops on behalf of a diverse range of American and international news organizations.[5] An additional 1,445 journalists worked as "unilaterals" traveling on their own and working without any affiliation with MNF troops.[6]

By reporting from the frontlines, these journalists put their lives at risk to serve important public interests. Battlefield journalists provide the public with the information they need to engage in the "'uninhibited, robust, and wide-open'" debate and discussion contemplated by the First Amendment. *Lamont v. Postmaster Gen. of the U.S.*, 381 U.S. 301, 307 (1965) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The public relies on prompt and accurate war reporting to apprise them of events unfolding half a world away and to inform them about the actions that the military takes in their name. "Military legal obligations include accountability to the civilian leadership and protection of the Constitution, including the First Amendment. Press coverage of military operations

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[4] *See* Army Field Manual 46-1, *Public Affairs Operations* 24 (1997), *available at* http://www.globalsecurity.org/military/library/policy/army/fm/46-1/46_1.pdf.

[5] Christopher Paul & James J. Kim, RAND Corp., *Reporters on the Battlefield: The Embedded Press System in Historical Context* xiii (2004).

[6] *Id.* at 55.

allows confirmation that the military is acting in accordance with American values and laws."[7]

Indeed, because the Executive enjoys the greatest latitude in matters of foreign affairs, the press serves a particularly critical function when reporting on wartime activities. As Justice Stewart explained:

> [T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment.

N.Y. Times Co. v. United States, 403 U.S. 713, 728 (1971) (Stewart, J., concurring).[8]

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[7] *Id.* at 22; *see also* U.S. Joint Chiefs of Staff, Joint Pub. 3-61, *Public Affairs* at I-7 (2005) ("Commanders have an obligation to inform the American public about their nation's military."), *available at* http://www.dtic.mil/doctrine/jel/new_pubs/jp3_61.pdf.

[8] Justice Stewart's views were not unique. First Amendment scholar Zechariah Chaffee wrote that the role of the press "is especially important in wartime." Zechariah Chafee, *Free Speech in the United States* 33 (1941).

> Truth can be sifted out from falsehood only if the government is vigorously and constantly cross-examined, so that the fundamental issues of the struggle may be clearly defined, and the war may not be diverted to improper ends, or conducted with an undue sacrifice, of

Current military policy recognizes the indispensable role that the press plays in informing the public and ensuring that the war effort retains democratic legitimacy.[9] The current policy of the Department of Defense is to provide the media with "long-term, minimally restrictive access to U.S. air, ground, and naval forces" by "embedding" journalists

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life and liberty, or prolonged after its just purposes are accomplished.

Id.; see also N.Y. Times, 403 U.S. at 717 (Black, J., concurring) (discussing role of press when soldiers are sent "off to distant lands to die of foreign fevers and foreign shot and shell").

[9] The military's past attempts to restrict press access during the invasions of Grenada and Panama provoked strong criticism from both the civilian leadership and the Pentagon itself. *See* 129 Cong. Rec. 299,04 (1983) (Senate resolution condemning denial of press access in Grenada); *A Statement of Principle on Press Access to Military Operations*, N.Y. Times, Jan. 11, 1984, at A10 (statement of major media organizations in response to restrictions on press access in Grenada); Chairman of the Joint Chiefs of Staff Media Relations Panel, Final Report (1984) ("The American people must be informed about the United States' military operations . . . . [T]he panel believes it is essential that the U.S. news media cover U.S. military operations to the maximum degree possible consistent with mission security and the safety of U.S. forces"); Fred S. Hoffman, *Review of the Panama Pool Deployment, December 1989*, Memorandum for Correspondents, The Pentagon, Washington, DC, March 1990.

with U.S. troops.[10] In adopting the embed policy, the Pentagon noted that "[o]ur ultimate strategic success in bringing peace and security to this region will come in our long-term commitment to supporting our democratic ideals. We need to tell the factual story—good or bad—before others seed the media with disinformation and distortions . . . ."[11] The Army Field manual similarly warns "that the perception of America's Army and how it conducts its operations can be as important to the Army's success as actual combat."[12]

In addition to "embedded" reporters, other journalists will often be present in areas of military conflict or dispersed among civilian populations. The Army Field Manual on Public Affairs Operations advises soldiers that "[t]here is no question that the news media will cover future military operations, and in most cases will be on the ground before American forces arrive."[13] Members of the various Judge Advocate General Corps are also trained to expect frequent interactions between the military

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[10] *See* U.S. Dep't of Defense, *Public Affairs Guidance on Embedding Media* § 2A (2003) *available at http://www.defenselink.mil/news/Feb2003/d20030228pag.pdf* Even more broadly, commanders are encouraged to "organize for and facilitate access of national and international media to U.S. forces, including those engaged in combat operations." *U.S. Joint Chiefs of Staff, Joint Pub. 3-61, supra* note 7, at III-23.

[11] *Guidance on Embedding Media, supra* note 10, at § 2A.

[12] Army Field Manual 46-1, *supra* note 4 at 12 (1997).

[13] *Id.* at 24.

and the media. A recent article by two Air Force JAG officers advises that "[t]he reality of the world in which judge advocates find themselves today is such that they must expect and plan for encountering large numbers of news media representatives in all phases of deployment—including actual hostilities."[14]

In evaluating the government's jurisdictional arguments, this Court should similarly anticipate that the government's detention policies in Iraq and in future areas of conflict will impact journalists and other civilians. As this Court recognized in *Hamdi*, journalists and war correspondents face a "very real" risk of erroneous military detention in the absence of sufficient due-process protections. *See Hamdi*, 542 U.S. at 530 (plurality opinion).

II. The Current War in Iraq Has Been Particularly Dangerous for Journalists.

The current war in Iraq illustrates the enormous dangers that journalists face in carrying out their professional responsibilities. The ongoing conflict has resulted in more journalist deaths than any conflict in the 20th Century, according to figures compiled by the Committee to Protect Journalists and the Freedom Forum. Almost twice as many journalists have died in the line of duty in Iraq than were killed in World War II or Vietnam. Reporting from the middle of an urban war zone, journalists—along with their translators and other media-support

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[14] Major Lisa L. Turner & Major Lynn G. Norton, *Civilians at the Tip of the Spear*, 51 Air Force L. Rev. 1, 12 (2001).

workers—face harassment and attacks from Iraqi insurgents, local government officials, kidnappers, and masked gunmen. Journalists have been caught in the crossfire of terrorist attacks, abducted as hostages, or murdered to silence their reporting. *See* Sam Dagher, *Iraqi Media Brave Assault From All Sides*, Christian Science Monitor, Dec. 20, 2007.[15]

The fog of war can also make it difficult for U.S. troops to distinguish between journalists and enemy forces. Journalists run the risk that their cameras will be mistaken for rocket-propelled grenades, *see* Sherry Ricchiardi, *Dangerous Assignment*, American Journalism Review Vol. 27, Issue 6 (Dec. 1, 2005); that they will be confused with Iraq insurgents, *see* Slobodan Lekic, *Reuters TV Soundman Killed in Baghdad, Cameraman Wounded*, AP Worldstream, Aug. 28, 2005; or that they will be suspected of being spies for foreign governments, *see Two Israeli Journalists Detained By U.S. Troops in Iraq*, AP Worldstream, Mar. 28, 2003.

U.S. troops have detained dozens of journalists and media-support workers in Iraq. While the majority of these journalists have been released within days without charges, over a dozen others have been held for months or as long as two years

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[15] More than 125 journalists and 50 media-support workers have been killed in Iraq since the war began in 2003. 32 journalists died in the year 2007 alone. Indeed, for the past five years in a row, more journalists have been killed in Iraq than in any other place in the world. Statistics collected by the Committee to Protect Journalists can be found at http://www.cpj.org/Briefings/Iraq/Iraq_danger.html.

without any charges or a meaningful hearing. These journalists include:

- Majed Hameed, a correspondent working for Reuters and Al-Arabiya, who was detained by U.S. troops for four months, from September 2005 to January 2006. *See* Eric Schmidt, *2,000 More M.P.'S Will Help Train the Iraqi Police*, N.Y. Times, Jan. 16, 2006, at A1 (noting that "Majed Hameed, an Iraqi reporter for the Al Arabiya network and Reuters, was released after four months in custody").

- Ali Mashhadani a freelance photographer for Reuters, who was detained for five months, from August 2005 to January 2006. *See News Agency Shocked By Imprisonment of Cameraman at Baghdad's Abu Ghraib*, AP Worldstream, Aug. 31, 2005.

- Samir Mohammed Noor, a television cameraman for Reuters, who was detained for eight months, from May 2005 to January 2006. *See U.S. Military Releases Freelance Cameraman from Prison in Iraq After 8 Months*, AP Worldstream, Jan. 22, 2006.

- Cyrus Kar, a freelance documentary filmmaker from the United States, who was detained for two months, from May 2005 to July 2005. *See* Tim Golden, *How a Trip to Film in Iraq Ended in a Military Jail Cell*, N.Y. Times, July 24, 2005.

- Abdul Ameer Younis Hussein, a cameraman for CBS news, who was detained for over a year, from April 2005 to April 2006. He continued to be detained by U.S. troops for months even after the Iraqi criminal court declined to prosecute him. *See* Robert F. Worth, *Detention of Iraqi Employees Angers Western News Media*, N.Y. Times Sept. 15, 2005, at A8. An Iraqi court eventually acquitted Hussein, citing a lack of evidence. *See* Vanessa Arington, *Iraqi Court Acquits CBS Cameraman for Lack of Evidence*, AP Worldstream, Apr. 5, 2006.

- Ammar Daham Naef Khalaf, a reporter from Agence France-Presse, who was detained by U.S. troops for six months, from April 2005 to October 2006. *See AP Photographer is Latest in a Long List of Detainees*, CPJ News Alert, Dec. 7, 2007, *available at* http://www.cpj.org/news/2007/mideast/iraq07dec07na.html.

The current detention of AP photographer Bilal Hussein has received the most extensive criticism from the American media and human-rights groups. Bilal Hussein is a Pulitzer Prize winning photojournalist who has worked with the AP since 2004. On April 12, 2006, Hussein was seized by U.S. forces in Ramadi, the capital of Iraq's Anbar province. He has been detained by U.S. troops in Iraq for nearly two years and, since early December 2007, has been undergoing an investigative hearing in an Iraqi court. *See* Tim Arango, *Case Lays Bare*

the Media's Reliance on Iraqi Journalists, N.Y. Times, Dec. 17, 2007; Lori Hinnant, *U.S. Detainees Sent To Iraqi Courts for Trial Face Legal System Mired in War's Chaos*, Associated Press, Dec. 6, 2007.

Given the important public interests they serve, the prolonged detention of journalists raises special concerns. When soldiers are forced to make split-second judgments in a chaotic and unpredictable urban conflict, it is inevitable that mistakes will sometimes be made. But because quick decisions must be made on the battlefield with little time for reflection, it is critical that detainees be promptly afforded a meaningful hearing before a neutral decisionmaker so they have an opportunity to demonstrate their civilian status or rebut the allegations against them.[16]

III. The Government's Proposed Jurisdictional Rule Would Pose an Unacceptably High Risk of Erroneous Detention in Current and Future Military Conflicts.

The government urges this Court to apply *Hirota v. MacArthur*, 338 U.S. 197 (1949), to bar all inquiry into military detentions by U.S. troops engaged as

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[16] As this Court noted in *Hamdi*, "initial captures on the battlefield need not receive the process we have discussed here; that process is due only when the determination is made to *continue* to hold those who have been seized." *Hamdi*, 542 U.S. at 534 (plurality opinion); *Cf. County of Sacramento v. Lewis*, 523 U.S. 833, 851 (1998) (noting the "different circumstances of normal pretrial custody and high-speed law enforcement" and explaining that government officials are held to a higher standard of care "when actual deliberation is practical").

part of an international military force or acting pursuant to the judgment of an international tribunal. These jurisdictional rules—which are nowhere expressed in the Constitution or any statute—would categorically foreclose all judicial relief for journalists and other civilians detained on the basis of mistaken identity or military error.

This Court has repeatedly rejected the government's attempts to insulate its military detentions and trials from judicial review. Most recently, when the government litigated the *Hamdi* case in the lower courts, it "submit[ted] that [courts] may not review at all its designation of an American citizen as an enemy combatant—that its determinations on this score are the first and final word." *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002). The Fourth Circuit correctly rejected that argument—both in its first appeal, and again when the *Hamdi* case returned to the Fourth Circuit in 2003. As Judge Wilkinson explained at the time: "The duty of the judicial branch to protect our individual freedoms does not simply cease whenever our military forces are committed by the political branches to armed conflict." *Hamdi v. Rumsfeld*, 316 F.3d 450, 464 (4th Cir. 2003), *vacated on other grounds*, 542 U.S. 507 (2004).

Yet the government now proposes a jurisdictional rule that would undercut *Hamdi* and effectively strip many future military detainees of all due-process protections. Whenever it is operating as part of an international alliance or in concert with a local government, the military would be able to detain and punish free of any judicial review.

Indeed, the vast majority of U.S. military activities already take place under the auspices of some international coalition or alliance. According to the Army Field Manual, the United States "normally pursues its national interests through multinational operations—those conducted by alliances and coalitions."[17] The President's National Security Strategy similarly makes clear that the United States will continue to use multinational coalitions to address the most pressing threats, especially global terrorism.[18] Such concerted multinational action is prevalent not only in areas of international armed conflict—such as Iraq today or Bosnia in the 1990s—but also in humanitarian, peace-building and peacekeeping operations spanning the globe. Today, U.S. forces are actively engaged as part of United Nations peacekeeping missions in areas including Liberia, Ethiopia and Eritrea, Haiti, Georgia, Kosovo, and the Middle East,[19] and they are deployed together with NATO allies in ongoing

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[17] Army Field Manual 1 ¶¶ 3-11 (2005), *available at* http://www.army.mil/fm1. A 2001 Report by the RAND Corporation likewise noted that "[t]he Army Vision recognizes explicitly that in future operations, Army forces will perform missions as part of a larger joint-combined-multinational force." Thomas S. Szayna, *et al.*, RAND Corp., *Improving Army Planning for Future Multinational Coalition Operations*, xi (2001).

[18] The National Security Strategy of the United States of America 14 (2006), *available at* http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf.

[19] United Nations Department of Peacekeeping Operations, Current Operations, Facts and Figures, *available at* http://www.un.org/Depts/dpko/dpko/.

operations and missions in Afghanistan, Kosovo, and Darfur.[20]

The government's interpretation of *Hirota* would block judicial review of military detentions for all these operations. The jurisdictional bar would strip judicial protection from journalists, war correspondents, medical personnel, humanitarian relief workers, United Nations staff, civilian engineers, and other civilians who could potentially be detained by U.S. troops. Civilians initially detained as a result of military error could be held permanently without charges or summarily transferred into the custody of local authorities who may provide little or no due process protection or engage in torture or other violations of humanitarian law.

The government's concerns about deference to military operations and international comity can and should be taken into account in fashioning the scope of the relief available to detainees. *Cf. In re Yamashita*, 327 U.S. 1, 30 (1946) (Murphy, J., dissenting); *Johnson v. Eisentrager*, 339 U.S. 763, 797 (1950) (Black, J., dissenting). But those concerns do not justify the creation of rigid jurisdictional rules that foreclose judicial review altogether. As this Court warned in *Hamdi*, "history and common sense teach us that an unchecked system of detention carries the potential to become a

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[20] The North Atlantic Treaty Organization, Current Operations and Missions, *available at* http://www.nato.int/.

means for oppression and abuse." *Hamdi*, 542 U.S. at 530 (plurality opinion). [21]

The government's proposed application of *Hirota* would create the same type of "unchecked system of detention" that *Hamdi* found constitutionally unacceptable. The practical consequences of such a jurisdictional bar would be devastating for journalists who may be detained while performing their professional duties in areas of military conflict. Nothing in Article III prevents the judiciary from hearing their claims.

CONCLUSION

For the foregoing reasons, the D.C. Circuit's decision in *Geren v. Omar*, No. 07-397, should be affirmed and its decision in *Munaf v. Geren*, No. 06-1666, should be vacated and remanded for further proceedings.

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[21] Because the habeas petitioners in this case are American citizens, this Court need not determine whether and to what extent non-U.S. citizens detained in Iraq are protected by federal habeas statutes and the Constitution. *See Rasul v. Bush*, 542 U.S. 466, 483 n.15 (2004); *Johnson v. Eisentrager*, 339 U.S. 763, 798 (1950) (Black, J., dissenting) (citing *Hirota v. MacArthur*, 338 U.S. 197, 199 (1949) (Douglas, J., concurring)).

Respectfully submitted,

PAUL M. SMITH*
KENYANNA SCOTT
JOSHUA A. BLOCK
ELISABETH GENN
JENNER & BLOCK LLP
919 Third Avenue,
Floor 37
New York, NY 10011
(212) 891-1627

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* *Counsel of Record*